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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

METROMEDIA, INC., *et al.*,

Petitioners,

v.

APRIL ENTERPRISES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment prohibits the imposition of a $14,000,000 punitive damage award where no state law establishes the maximum punishment to which the defendant could be exposed for the conduct found to warrant punishment and the jury has essentially unrestrained discretion to impose punishment in unlimited amounts.

2. Whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damage awards imposed in civil actions and, if so, whether a punitive award of $14,000,000 is excessive under that Clause.

3. Whether the Due Process Clause of the Fourteenth Amendment prohibits the imposition of punitive damages in civil actions unless defendants are afforded some or all of the procedural rights enjoyed by defendants in criminal proceedings.*

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* In addition to the parties named in the caption, Station KTTV is also a petitioner in this case. Pursuant to Rule 28.1 of the Rules of this Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries, and affiliates of petitioners: Metromedia, Inc., a defendant below, remains in existence as a corporate entity since its liquidation pursuant to Delaware law only because of pending litigation. Station KTTV, a defendant below, was formerly a portion of Metromedia Television Division of Metromedia, Inc. The liability for this judgment has been assumed by Metromedia Company, a partnership. Metromedia Company has subsidiaries or affiliates that it does not wholly own as follows: Orion Pictures Corp.; Make Systems, Inc.; Ponderosa, Inc.; and Cellular Systems, Inc.

TABLE OF CONTENTS

	Page
OPINIONS AND ORDERS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Statement of the Facts	3
B. Presentation of the Federal Questions to the California Courts	5
REASONS FOR GRANTING THE WRIT	12
A. The Importance and Substantiality of the Questions Presented	12
B. Prudential Concerns Do Not Militate Against Review of the Substantial Federal Questions Presented by this Case	15
CONCLUSION	22

TABLE OF AUTHORITIES

CASES: Page

Aetna Life Insurance Co. v. *Lavoie*, 475 U.S. 813 (1986) ..... *passim*

April Enterprises, Inc. v. *KTTV*, 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983) 4

Atlantic Richfield Co. v. *Nielsen*, *cert. denied*, 108 S. Ct. 2023 (1988) 12,13

Bankers Life and Casualty Co. v. *Crenshaw*, 108 S. Ct. 1645 (1988) ..... *passim*

Barr v. *City of Columbia*, 378 U.S. 146 (1964) 11

Braniff Airways v. *Nebraska State Board*, 347 U.S. 590 (1954) 11

City of Yonkers v. *United States*, A-175 (U.S. Sept. 1, 1988) 13

CNA Casualty of California v. *Rouhe*, No. 88-297, *pet. for cert. filed*, Aug. 18, 1988 17

Colonial Pipeline Co. v. *Wright Contracting Co.*, No. 87-2007, *app. dism'd for want of juris.*, Oct. 3, 1988 17

Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967) 13

Downey Savings and Loan Association v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 825 (1987), *cert. denied*, 108 S. Ct. 2023 (1988) ..... *passim*

Electro Services, Inc. v. *Exide Corporation*, 847 F.2d 1524 (11th Cir. 1988) 20,21

Federal Deposit Insurance Corp. v. *W.R. Grace & Co.*, No. 84-5031 (N.D. Ill. June 6, 1988) 21

Grimshaw v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) 10

Hasson v. *Ford Motor Co.*, 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982) 10

Table of Authorities Continued

	Page
Hodder v. *The Goodyear Tire & Rubber Co.*, 426 N.W. 2d 826 (Minn.), No. 88-___, *pet. for cert. filed*, Oct. 14, 1988	19-20
Illinois v. *Gates*, 462 U.S. 213 (1983)	21
Industrial Chemical & Fiberglass Corp. v. *Chandler*, Nos. 86-381 & 86-385 (Ala. Sept. 30, 1988)	21
Ingraham v. *Wright*, 430 U.S. 651 (1977)	20,21
Kelco Disposal, Inc. v. *Browning-Ferris Industries of Vermont, Inc.*, 845 F.2d 404 (2d. Cir.), No. 88-556, *pet. for cert. filed*, Oct. 1, 1988	20
Miller v. *Cudahy Co.*, No. 77-1212 (10th Cir. Sept. 28, 1988)	20
Multiplex Insurance Agency v. *California Insurance Agency*, 189 Cal. App. 3d 925, 235 Cal. Rptr. 12 (1987)	10
Nationwide Mutual Insurance Co. v. *Clay*, 525 So. 2d 1339 (Ala. 1987), No. 88-157, *pet. for cert. filed*, July 27, 1988	17
Palmer v. *A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984)	21
Peterson v. *Superior Court*, 31 Cal. 3d 147 (1982)	8,19
Sanchez-Corea v. *Bank of America*, 38 Cal. 3d 892, 215 Cal. Rptr. 679, 701 P.2d 826 (1985)	18
Smith v. *Wade*, 461 U.S. 30 (1983)	14
Tetuan v. *A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987)	21
Toole v. *Richardson-Merrell Inc.*, 251 Cal. App. 2d 689 (1967)	10,11
Underwriters Life Insurance Co. v. *Cobb*, 746 S.W. 2d 810 (Tex. Civ. App. 1988)	21
Unified School District v. *The Celotex Corp.*, 6 Kan. App. 346, 629 P.2d 196 (1981)	21

Table of Authorities Continued

	Page
Weirum v. *RKO General, Inc.*, 15 Cal. 3d 40 (1975)	9
FEDERAL CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:	
Sixth Amendment	15
Eighth Amendment (Excessive Fines Clause)	*passim*
Fourteenth Amendment, Section 1 (Due Process Clause)	*passim*
Fourteenth Amendment, Section 1 (Equal Protection Clause)	11
28 U.S.C. § 1257(3)	3
Rule 28.1, Rules of the Supreme Court	i
STATE STATUTES:	
Cal. Civ. Code Ann. § 1787.3 (West 1985)	16
Cal. Civ. Code Ann. § 3294, *as amended*	16
Cal. Civ. Code Ann. § 3295, *as amended*	17

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

On April 22, 1986, in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), this Court first announced that the unrestrained infliction of punishment in the form of punitive damages in civil actions raises important federal constitutional questions. Just two months later, the jury in this case imposed a $14,000,000 punitive fine on petitioners (hereafter "Metromedia"). In post-trial briefs filed by Metromedia, it asserted as defenses to the jury's verdict the constitutional objections to punitive damages identified by this Court a few months earlier. Since that time and despite this Court's reiteration and reinforcement of the concerns articulated in *Aetna*, the

California appellate courts have turned a deaf ear to the constitutional implications of this governmentally sponsored system for administering punishment. The California legislature has likewise, in the course of enacting "tort reform" legislation, ignored these fundamental problems. There remains no room for doubt that the important and far-reaching questions raised by punitive fines such as the one at issue here cannot be resolved without this Court's intervention in this case.

OPINIONS AND ORDERS BELOW

The opinion of the California Court of Appeal of June 9, 1988, was ordered by that court to remain "unpublished," *see* note 9, *infra*, and is reproduced in App. A, 1a-28a. The order of the Court of Appeal, dated July 6, 1988, denying Metromedia's Petition for Rehearing and the remittitur of that court issued on September 12, 1988 are unreported and are reproduced in App. B, 29a-30a. The August 31, 1988 order of the Supreme Court of California denying Metromedia's Petition for Review is reproduced in App. C, 31a, and is unreported. The September 23, 1988 order of the Court of Appeal denying Metromedia's motion to recall remittitur for the purpose of staying the judgment and the Judgment on Special Verdict are unreported and are reproduced in App. D, 32a-36a. The October 11, 1988 order of this Court granting Metromedia's Application for Stay is unreported and is reproduced in App. E, 37a.

JURISDICTION

The June 9, 1988 decision of the California Court of Appeal expressly rejected Metromedia's federal

constitutional challenge to the $14,000,000 punitive damage award presented as Question 3, and implicitly rejected Metromedia's federal challenges now presented as Questions 1 and 2. That court denied rehearing on July 6, 1988, and the Supreme Court of California declined on August 31, 1988 to review these (and state law) challenges to the punitive fine. This Petition is filed within ninety days of the denial of the Petition for Review by the Supreme Court of California. As discussed in appropriate detail below, each of these questions was properly presented to the California courts and each is therefore within this Court's jurisdiction under 28 U.S.C § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> [N]or shall any State deprive any person of . . . property, without due process of law . . . .

2. The Excessive Fines Clause of the Eighth Amendment provides, in pertinent part:

> [N]or [shall] excessive fines [be] imposed . . . .

STATEMENT OF THE CASE

A. Statement of the Facts

In September 1976, respondent April Enterprises, Inc. (hereafter "April") sued Metromedia in the Los Angeles Superior Court for damages arising out of Metromedia's erasure, pursuant to a 1965 written contract between the parties, of certain videotapes of the "Wincheil-Mahoney Time" television programs.

At the first trial in 1981, the trial court granted Metromedia's motion for judgment on the pleadings and motion for a judgment of nonsuit after April's opening statement. This decision was reversed and remanded by the Court of Appeal in *April Enterprises, Inc.* v. *KTTV*, 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983).

The case went to trial again on June 2, 1986 on April's Fourth Amended Complaint in which April sought, *inter alia*, $10,000,000 in punitive damages. The jury rendered a verdict on July 2, 1986 in favor of April and, in addition to compensatory damages, awarded $14,000,000 in punitive damages against Metromedia. Judgment on the verdict was filed that same day. App. D.

On July 14, 1986, April filed a motion for leave to amend its complaint to conform to the jury's decision to award punitive damages substantially in excess of the amount sought by April. By prior stipulation of the parties and with the trial court's approval, that motion was deemed to have been filed prior to the jury's verdict. [RT 2380-81]. On August 22, 1986, Metromedia filed its opposition to that motion in which it raised its federal constitutional objections to the punitive damage award. As discussed below, these challenges were reiterated and articulated with greater elaboration four days later in connection with Metromedia's post-trial motions for a new trial and a judgment notwithstanding the verdict.

After the trial court simultaneously denied Metromedia's post-trial motions and granted April's motion to enlarge its prayer for punitive damages to conform to the jury's verdict, Metromedia appealed. Following extensive briefing and oral argument, the Court of

Appeal affirmed the trial court's judgment in an unpublished opinion issued on June 9, 1988. Metromedia filed a timely Petition for Rehearing in the Court of Appeal which was denied on July 6, 1988. On July 19, 1988, Metromedia filed a Petition for Review in the Supreme Court of California. That Petition was denied on August 31, 1988, with only Chief Justice Lucas voting to hear the case. On October 11, 1988, this Court entered a stay of the judgment of the Court of Appeal.

B. Presentation of the Federal Questions to the California Courts

Only four months after this Court, in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986), first pronounced that the imposition of punitive damages in civil actions raises important questions under the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment, Metromedia argued that the jury's $14,000,000 punitive award in this case was impermissible and excessive under those same provisions. Pertinent portions of Metromedia's submission are reproduced in App. F, 38a-43a.

In that submission to the trial court, Metromedia argued:

> (1) that it had been "subjected to an open-ended punitive award, while the federal [and] state legislatures have frequently limited the amount of monetary punishment which can be imposed in both civil and criminal proceedings" and that this "exposure to open-ended damages, therefore, violated Metromedia's right to Equal Protection under the Fourteenth Amendment . . . .";

(2) that the $14,000,000 punitive award "cannot be reconciled with the excessive fines clause imposed on the states under the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment of the United States Constitution";

(3) that the $14,000,000 punitive award "demonstrates the unconstitutional nature of punitive damages, which can be imposed arbitrarily by a jury, under vague standards, in an amount far beyond the punishment necessary to serve any legitimate purpose"; and

(4) that "Due Process requires that states impose no punishment on an individual without first observing all of the incidents of a criminal trial."[1]

The trial court denied Metromedia's post-trial motions without opinion. In its opening brief on appeal, Metromedia raised and briefed these federal chal-

[1] These four arguments were advanced in Metromedia's memorandum filed in reply to April's opposition to Metromedia's post-trial motions for a judgment notwithstanding the verdict and for a new trial. April never suggested to the trial court that these constitutional challenges were not timely raised. In its brief on appeal, April joined issue on the constitutional questions, but also argued vaguely that these challenges were required to be presented "prior to judgment." April did not explain how, for example, the excessiveness of the punitive damage award could be challenged "prior to judgment" or otherwise claim any prejudice arising out of Metromedia's presentation of these federal challenges to the trial court. As discussed in note 2, *infra*, these challenges must in any event be regarded as having been advanced prior to the verdict assuming that California procedure would have called for that—which it does not, *see* note 3, *infra*.

lenges once again, arguing that the Excessive Fines Clause should be applied to punitive damage awards, that Metromedia's "exposure to open ended damages" violated its Fourteenth Amendment rights, and that the Fourteenth Amendment required that it have the benefit of process due defendants in criminal cases before it could be punished. App. G, 44a-48a. As it had done in the trial court, Metromedia also argued that the $14,000,000 punitive damage award against it violated California's constitutional counterparts to the federal constitutional provisions upon which Metromedia relied. In its brief on appeal, April argued somewhat obliquely that these federal and state constitutional arguments should have been presented "prior to judgment"[2] and went on to contend, App. I, 53a:

> [T]he California Supreme Court (as well as every lower California appellate court) has consistently rejected precisely the arguments resurrected by [Metromedia] .... The unbroken string of authorities rejecting Metro-

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[2] In its opposition to April's motion for leave to amend its prayer to conform to the jury's verdict, Metromedia raised these same federal constitutional objections to the punitive damage award. Although Metromedia's opposition to that motion was filed on August 22, 1986, the parties had stipulated, RT 2380-81, in order to accommodate the trial judge's vacation schedule, to deem April's motion to have been filed prior to the verdict. Under these circumstances, Metromedia's opposition to April's motion, pertinent portions of which are reproduced in App. H, 49a-51a, must also be regarded as having been filed prior to the jury's verdict. Therefore, even if there were any support for April's argument below that these federal constitutional challenges had to be raised at some point prior to the jury's verdict, Metromedia would have complied with that standard.

> media's argument continues with Downey Savings and Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1100-1101, in which Division three of this Court recently rejected such arguments.

In its decision in this case, the Court of Appeal accepted April's argument that it was required by precedent to reject Metromedia's constitutional arguments. The Court below stated, App. A, 27a:

> Finally, defendants claim it was unconstitutional to assess punitive damages against them without affording them "the safeguards normally associated with penal-type proceedings." They also admit this claim has been rejected by our Supreme Court. (*Peterson* v. *Superior Court* (1982) 31 Cal. 3d 147, 161; see also, *Downey Savings & Loan Assn.* v. *Ohio Casualty Ins. Co.* (1987) 189 Cal. App. 3d 1072,1101.) Those decisions are dispositive on this issue.

In a Petition for Rehearing, Metromedia again articulated its federal challenges and pointed out that the Court of Appeal had failed to address expressly Metromedia's Eighth Amendment and non-procedural Fourteenth Amendment challenges to the punitive damage award. Metromedia also pointed out that this Court's May 16, 1988 opinion in *Bankers Life* had been brought to the attention of the Court of Appeal prior to its June 9, 1988 decision and argued that that court had an obligation under *Bankers Life* to issue a "reasoned opinion" on these federal questions even if it disagreed with Metromedia's positions. App. J, 55a-56a. In its brief in opposition to Metromedia's

Petition for Rehearing, April asserted, correctly, that "[o]ne hundred percent of the issues raised in [Metromedia's] petition [for rehearing] were throughly briefed, argued and considered in the second appeal of this action." App. K, 60a. The court denied rehearing without further comment on these issues. App. B. Metromedia raised these issues yet again in a Petition for Review in the Supreme Court of California, which denied review as a matter of its discretion.[3]

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[3] In its "Answer" to Metromedia's Petition for Review, April asserted for the first time in this litigation that Metromedia had "waived" its federal constitutional challenges. April purported to base this argument on the fact that Metromedia had suggested to the trial court an alternative to the standard California punitive damage instruction proposed by April. April argued from this circumstance that Metromedia was thereafter precluded from attacking "the substance of an instruction if [it] proposed similar instructions," *quoting Weirum* v. *RKO General, Inc.*, 15 Cal. 3d 40, 50 (1975). April's argument erroneously assumed that the "substance" of the alternative instruction suggested by Metromedia (and rejected by the trial court) or the standard instruction proposed by April (and given by the trial court) addressed Metromedia's constitutional challenges. Neither instruction did so, for the simple reason that juries do not decide issues of law, much less issues of constitutional law. April's "waiver" argument is also inconsistent with the disposition of this case by the Court of Appeal, which expressly decided Metromedia's federal procedural due process challenge to the manner in which the trial had been conducted. Furthermore, it assumes that such constitutional rights are susceptible to being "waived" before they have been declared to exist by *any* court, a dubious proposition. *See* note 5, *infra*.

April's "waiver" argument is also contradicted by at least five cases cited by April to the Supreme Court of California in that same brief, at p. 17, in support of April's primary submission that these federal questions had already been resolved

Based upon the foregoing facts drawn from the record and briefs below, there can be no doubt that the federal questions Metromedia presents in this Petition were properly presented to the California courts. Metromedia's federal constitutional challenge that was expressly rejected by the Court of Appeal—the procedural due process challenge (Question 3)—had been raised in the trial court at precisely the same times as the federal challenges not expressly decided by the Court of Appeal (Questions 1 and 2). In its brief on direct appeal in the Court of Appeal, April itself urged that that court's prior decision in *Ohio Casualty* (which was at that time pending before this Court on a petition for writ of certiorari) was dispositive of Metromedia's constitutional "arguments," not simply Metromedia's procedural due process argument. App. I, 53a. And in its brief in opposition to Metromedia's Petition for Rehearing, App. K, 61a-64a, April argued that the express rejection of Metromedia's "procedural due process" argument and the Court of Appeal's silence with respect to Metromedia's non-procedural due process and

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against Metromedia by the California courts. In those cases, the constitutional issues were apparently either not raised in the trial court at all, *see Downey Savings and Loan Association* v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 825 (1987), *cert. denied*, 108 S. Ct. 2023 (1988); *Hasson* v. *Ford Motor Co.*, 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982); or had been raised for the first time at the post-trial stage, *see, e.g.*, *Toole* v. *Richardson-Merrill, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); *Multiplex Insurance Agency* v. *California Insurance Agency*, 189 Cal. App. 3d 925, 235 Cal. Rptr. 12 (1987); *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

Eighth Amendment arguments were each justified by controlling precedents in the California courts.[4]

Finally, and as noted above, note 3, *supra*, the California appellate courts have decided these very constitutional questions in cases in which these questions were not even presented to the trial courts. That practice is fatal to any jurisdictional objection April might raise in this Court. *See, e.g., Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964) (procedural barriers to this Court's consideration of substantial federal questions must be "strictly or regularly followed" in order to deprive this Court of jurisdiction). Thus, this Court clearly has jurisdiction over this case and may decide each of the questions presented. Furthermore, and as discussed below, there are no purely prudential considerations that would justify a discretionary denial of review of this case.

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[4] For example, April argued on rehearing that a 1967 decision of the Court of Appeal had squarely rejected Metromedia's contention that the open-ended exposure to unlimited punitive damages violated the Due Process Clause. App. K, 62a-63a, *citing Toole* v. *Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (1967). Although Metromedia relied on the Equal Protection Clause of the Fourteenth Amendment to support this challenge in the trial court and Court of Appeal—a challenge more appropriately cognizable under the Due Process Clause—this Court's cases make clear that failure to name the correct provision of the Constitution poses no impediment to this Court's review. *See, e.g., Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590 (1954). April's brief in opposition to the Petition for Rehearing leaves no doubt that April fully understood the nature of Metromedia's constitutional challenge to the imposition of open-ended punitive damage awards. *See* App. K, 62a-64a.

REASONS FOR GRANTING THE WRIT

Purporting to rely on this Court's decision in *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988), and a number of other cases disposed of by this Court on May 31, 1988, which had been held for the decision in *Bankers Life*, April argued to the Court of Appeal in opposition to Metromedia's Petition for Rehearing that the "CONSTITUTIONAL HORSE, WHICH [METROMEDIA] CONTINUES TO FLOG, IS DEAD." App. K, 60a. If April's argument is correct, then this Petition should be denied. April's argument is not, however, correct.

A. The Importance and Substantiality of the Questions Presented

So far as Metromedia is aware, the case at bar is the first case to come to this Court in which the Fourteenth Amendment and the Eighth Amendment have been invoked at *all* levels of a state (or federal) court system to challenge the imposition of *any* punitive damages in the absence of limits on such awards, the constitutional excessiveness of an enormous punitive damage award, and the process by which such punishment is administered. With respect to the initial due process question, Justice O'Connor, joined by Justice Scalia, most recently stated in concurrence in *Bankers Life* that the "grant [to a jury] of wholly standardless discretion to determine the severity of punishment [in the form of punitive damages] appears inconsistent with due process." 108 S. Ct., at 1656.

With respect to the Eighth Amendment question, Justices O'Connor and Kennedy, by stating that they would have granted certiorari in *The Ohio Casualty*

Insurance Co. v. *Downey Savings and Loan Association, cert. denied*, 108 S. Ct. 2023 (1988), and *Atlantic Richfield Co.* v. *Nielsen, cert. denied*, 108 S. Ct. 2023 (1988), have strongly indicated that the Court should reach and decide this "important" question.[5] In addition, Justice Marshall—the author of the Court's opinion in *Bankers Life*—joined by Justice Brennan, more recently implicitly refuted April's assertion that this constitutional issue is no longer viable.

Concurring in the Court's action in denying a stay sought by the City of Yonkers in *City of Yonkers* v. *United States*, No. A-175 (Sep. 1, 1988), Justice Marshall rejected the City's argument that the Eighth Amendment's Excessive Fines Clause should be applied to a fine imposed for civil contempt in an effort to coerce the City into complying with a consent decree. In rejecting that argument, Justice Marshall reiterated that the question of the applicability of the Excessive Fines Clause to punitive damage awards is "of some moment and difficulty," slip op., at 8 (slip

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[5] In *Atlantic Richfield Co.* v. *Nielsen, cert. denied*, 108 S. Ct. 2023 (1988), the petitioner had raised no federal objections in the California courts to a $3,500,000 punitive damage award until its filing of a Petition for Review in the Supreme Court of California. Under those circumstances, the votes of Justices O'Connor and Kennedy to grant certiorari in that case suggest that the argument advanced by the petitioner—that it could not waive a constitutional right not yet declared to exist—is independently worthy of this Court's plenary consideration if that question has not indeed already been answered by this Court in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 143 (1967) (constitutional right not yet recognized cannot be waived) (plurality opinion of Harlan, J.); *id.*, at 172 n.1 (Brennan, J., joined by White, J.).

op. issued in companion applications in *Spallone* v. *United States*, A-172, -173, -174 & -175 (Sep. 1, 1988), *quoting Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct., at 1651. Justice Marshall went on to articulate the constitutional distinction between punitive damages and other forms of relief generally available in civil actions which lies at the heart of Metromedia's Excessive Fines Clause challenge to this $14,000,000 punitive damage award: the "Excessive Fines Clause[] applies to punishments for past conduct . . . ." Slip op., at 9. Justice Marshall's opinion did not, as it might—erroneously in Metromedia's view—have done, suggest that the Excessive Fines Clause applies only to punishment administered after a criminal trial. Rather, it reinforced the message of *Bankers Life* that had originated in *Aetna* that the applicability of the Excessive Fines Clause to punitive damages remains an important question that must be decided by this Court in an "appropriate" case. This is that case.

Finally, the question whether "a punitive 'fine' should be imposed after a *civil* trial," *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (emphasis added), is manifestly of great importance and worthy of plenary consideration by this Court in the case at bar. Metromedia was assessed a punishment of $14,000,000 by the court below for conduct facially authorized by a provision in a contract that was judicially construed more than fifteen years after the operative events to prohibit that which it appeared explicitly to permit. By approving punitive damages in such circumstances, California has, for all practical purposes, conferred on plaintiffs like April the power to prosecute and recover immense bounties for conduct ostensibly permissible but characterized as op-

pressive after the fact by civil juries. If a violation of such a vague and retrospective standard is perceived by a jury, then these private prosecutors may collect from defendants monetary punishments that are constitutionally indistinguishable from, and generally vastly greater than, the punitive fines that may be imposed for more egregious, clearly prohibited antisocial conduct upon conviction after a criminal trial. Of course, in a criminal trial a defendant would be entitled to important procedural protections, including a standard of proof beyond a reasonable doubt, before punishment could be imposed. This civil imposition of harsh financial penalties for the benefit of private prosecutors and their counsel cannot be reconciled with the Court's cases, which require that before the States may impose sanctions in order to punish and deter antisocial conduct, the guarantees of the Sixth, Eighth and Fourteenth Amendments must be accorded.

B. Prudential Concerns Do Not Militate Against Review of the Substantial Federal Questions Presented by this Case

This case answers all of the prudential concerns raised by the Court in *Bankers Life* with regard to the exercise of its discretionary jurisdiction over questions of such far-reaching importance and impact. California, by population, is the largest state jurisdiction in the Nation and, historically and statistically, has been crucible of punitive damage theory and the leading venue for the proliferation of severe punitive damage awards. If the punitive damage regime in California is not to be brought under control—or even seriously re-evaluated—by the California legislature and court system, then whatever efforts are made to

do so in other jurisdictions will not resolve these problems even if there were any concrete basis for believing that such efforts in other jurisdictions might eventually succeed.

In *Bankers Life*, the Court refrained from addressing similar constitutional challenges to a $1,600,000 punitive damage award in view of "possibly more appropriate resolutions" of the issues posed by such harsh and increasingly frequent awards. 108 S. Ct., at 1651. The Court expressed the hope that state legislatures might act, *id.*, and in doing so cited a California statute enacted in 1977 in which the legislature imposed limits on punitive damage awards in a narrow range of civil cases brought under a statutory right of action conferred on applicants for consumer credit against creditors who regularly extend such credit. *Id.*, at 1651 n.3, *citing Cal. Civ. Code Ann.* § 1787.3 (West 1985).

On September 30, 1987, however, the Governor of California signed into law a comprehensive "tort reform" package, Senate Bill No. 241, which, *inter alia*, amended in a number of respects *Cal. Civ. Code* § 3294, the statute pursuant to which punitive damages were and continue to be generally authorized in civil actions *without limit*. (A copy of that bill as enacted is reproduced in App. L.) Thus, the response of the California legislature to the warning signals sent by this Court in deciding *Aetna* in April 1986 and in noting probable jurisdiction in *Bankers Life* in March 1987 has been to make minor adjustments to punitive damage law in California and not to address the fundamental issues presented by Metromedia in the case at bar.[6]

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[6] Under § 3294 prior to its amendment, punitive damages in

In *Bankers Life*, the Court also suggested the possibility that, in the absence of legislative action, the state courts might resolve these issues through reliance on state constitutions or other non-federal grounds. 108 S. Ct., at 1651. Although a plurality of the Supreme Court of Georgia had already done so in a case recently dismissed from this Court's appellate docket for want of jurisdiction,[7] the California judiciary in this case did not choose to accept the invitation implicit in *Bankers Life*. At each stage of this case, Metromedia invoked all available provisions of the California Constitution in support of its challenges to the imposition of punitive damages in this

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unlimited amounts could be imposed where a preponderance of the evidence showed that the defendant had "been guilty of oppression, fraud, or malice." As amended, it now requires proof "by clear and convincing evidence." The definition of "malice" and "oppression" were also revised to require that the conduct be found "despicable" in certain circumstances in order to support punitive damages. More broadly, the 1987 legislation provided that evidence of a defendant's financial condition not be admitted prior to a finding of liability and a finding of "malice, oppression or fraud" warranting punitive damages, and provided that complaints for punitive damages not state and amount or amounts. (Amending *Cal. Civ. Code.* § 3295). The legislation also made adjustments in the relationships among attorneys and their clients in cases handled on a contingency fee basis and the relative rights of insurance carriers and their insureds in situations involving an obligation to defend.

[7] *Colonial Pipeline Co.* v. *Wright Contracting Co.*, No. 87-2007, *app. dism'd for want of juris.*, June 8, 1988. The judgment in that case would appear not to have been final for purposes of the exercise of this Court's jurisdiction. This Court also has on its docket two other cases, *Nationwide Mutual Insurance Co.* v. *Clay*, No. 88-157, *pet. for cert. filed*, July 27, 1988, and *CNA Casualty of California* v. *Rouhe*, No. 88-297, *pet. for cert. filed*, Aug. 18, 1988, in which several of these questions are presented.

case. The Court of Appeal, responding to April's arguments, apparently decided that it was bound by prior California decisions which the Supreme Court of California, in denying review, chose not to revisit even though the $14,000,000 award in this case eclipses by $9,000,000 million the largest punitive damage award ever "approved" by that court.[8]

In *Bankers Life*, the Court also expressed the preference that if these issues had not been resolved as a matter of state law, state courts would be able to resolve these federal questions "in the first instance," with the stated goal of giving this Court the subsequent opportunity to decide them with "the benefit of a well-developed record and a reasoned opinion on the merits." 108 S. Ct., at 1651. As Metromedia demonstrates above, these federal questions were fully presented to the trial court promptly after this Court's decision in *Aetna* and again to the Court of Appeal on direct appeal. In addition, counsel for April promptly brought this Court's decision in *Bankers Life* to the attention of the Court of Appeal and asserted that this Court had, on May 31, 1988, "upheld punitive awards ranging from 3.5 to 10 million dollars." App. M, 77a. April's counsel strongly implied that these issues had for all practical purposes been extinguished by this Court. *Id.*

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[8] As Metromedia pointed out to that court in its Petition for Review, the largest punitive damage award ever affirmed by that court was $1,000,000 in *Sanchez-Corea* v. *Bank of America*, 38 Cal. 3d. 892, 215 Cal. Rptr. 679, 701 P.2d 826 (1985), while the largest award left standing by an intermediate California appellate court was, until denial of review in this case, the $5,000,000 award at issue in *Ohio Casualty*, *supra*.

In response, Metromedia's counsel wrote to the Court of Appeal on June 10, 1988 (one day after, unknown to counsel, the Court of Appeal issued its unpublished opinion) and pointed out, *inter alia*, that *Bankers Life* "strongly supports the value and appropriateness of a full and well-reasoned exploration of these issues by *this* Court [of Appeal] in the instant case." App. N, 79a-80a. This plea, renewed and expanded upon at length in Metromedia's Petition for Rehearing in the court below and in its Petition for Review to the Supreme Court of California, was ignored.[9] The unmistakable message of this Court in *Bankers Life* drew but a single vote, that of Chief Justice Lucas, to hear this case.

The California courts are not alone in their summary rejection of, or indifference to, these profound constitutional issues. In *Hodder* v. *The Goodyear Tire*

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[9] The antipathy of the California courts towards these important constitutional issues is also reflected in the decision of the court below ordering that the opinion in this case not be published. Under California procedure, judicial opinions are generally to be published if they involve, *inter alia*, a legal development of significant interest or if they establish a new rule on a matter of widespread interest to the public. On June 24, 1988, Metromedia wrote to the Court of Appeal and requested that the opinion in this case be published because it met the foregoing criteria. App. O, 81a-84a. April responded in a letter dated June 28, 1988, in which it argued, *inter alia*, that Metromedia's constitutional challenges had been resolved against it in *Peterson* v. *Superior Court*, 31 Cal. 3d 147 (1982), that this Court had, in *Bankers Life*, "firmly stated" that these questions "should be left to the states for resolution" and that the six-year old decision in *Peterson* "constitutes such a resolution," App. O, 89a. After the Court of Appeal denied Metromedia's request, the Supreme Court of California also denied that request. App. D, 31a.

& Rubber Company, 426 N.W. 2d 826 (Minn.), No. 88-___, *pet. for cert. filed*, Oct. 14, 1988, the Supreme Court of Minnesota, in imposing *de novo* a $4,000,000 punitive damage award in a products liability case, did not even address the federal constitutional objections raised by the defendant to the imposition of punitive damages in unlimited and excessive amounts. The Second Circuit, on April 21, 1988, affirmed a $6 million punitive damage award in an opinion devoting four sentences to the defendants' argument that that award was excessive under the Eighth Amendment. *Kelco Disposal, Inc.* v. *Browning-Ferris Industries of Vermont, Inc.*, 845 F.2d 404 (2d Cir.), No. 88-556, *pet. for cert. filed*, Oct. 1, 1988.[10] Fully six weeks after the decision in *Bankers Life*, the Eleventh Circuit responded to this Court's invitation by rejecting—albeit in *dicta*—the Eighth Amendment's applicability to punitive damage awards, viewing the question as foreclosed by the decision in *Ingraham* v. *Wright*, 430 U.S. 651 (1977). *See Electro Services, Inc.* v. *Exide Corporation*, 847 F.2d 1524, 1530 (11th Cir. 1988). On September 28, 1988, the Tenth Circuit rejected Eighth and Fourteenth Amendment challenges to a $10,000,000 punitive damage award in a single paragraph of a 28-page opinion, declaring that the appellants "have cited no persuasive federal constitutional authority to support their argument." *Miller* v. *Cudahy Co.*, No. 77-1212 (10th Cir. Sept. 28, 1988) slip op., at 22. And on September 30, 1988, the Supreme Court of Alabama squarely held, based upon

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[10] In its opinion, the Second Circuit was prepared to assume the applicability of the Eighth Amendment but went on to hold that the award would not in any event be violative of the Eighth Amendment if that assumption were correct. 845 F.2d, at 410.

its analysis of *Ingraham* v. *Wright*, that "punitive damages awarded in a civil proceeding are not subject to the constitutional restrictions of the Eighth Amendment, which applies to criminal proceedings only." *Industrial Chemical & Fiberglass Corp.* v. *Chandler*, Nos. 86-381 & 86-385 (Ala. Sept. 30, 1988), slip op., at 9.

As the decisions in *Electro Services*, *Industrial Chemical*, the case at bar and many other cases illustrate, the lower courts—both state and federal—regard themselves as bound by *Ingraham* v. *Wright* on the Eighth Amendment question.[11] Although their understanding of *Ingraham* is surely incorrect, it is also true that the "stability of [this Court's] precedents" does not, as a general matter, suggest that the lower courts should "depart from this Court's decisions whenever they conclude such modification is in order." *Illinois* v. *Gates*, 462 U.S. 213, 251 (1983) (White, J., concurring in the judgment). Only this Court can finally elucidate the *dicta* in *Aetna* regarding the "importance" of these questions, *dicta*

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[11] In addition to *Electro Services* and *Industrial Chemical*, virtually every decision rejecting the applicability of the Eighth Amendment to punitive damage awards has purported to rely directly or indirectly on *Ingraham* v. *Wright*. *See, e.g.*, *Federal Deposit Insurance Corp.* v. *W.R. Grace & Co.*, No. 84-5031 (N.D. Ill. June 6, 1988); *Tetuan* v. *A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987); *Underwriters Life Insurance Co.* v. *Cobb*, 746 S.W.2d 810 (Tex. Civ. App. 1988); *Downey Savings and Loan Association* v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S. Ct. 2023 (1988); *Palmer* v. *A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984); *Unified School District* v. *The Celotex Corp.*, 6 Kan. App. 2d 346, 629 P.2d 196 (1981).

subsequently reinforced by the full Court in *Bankers Life* and by Justice Marshall in *City of Yonkers*.

CONCLUSION

This Court presently has on its docket five cases in which punitive damages totalling more than $25,000,000 have been imposed in violation of the Constitution if the arguments first legitimated by this Court in *Aetna Life Insurance Co.* v. *Lavoie* are ultimately determined to be well-founded. The time has surely come for the Court to exercise its power and responsibility to determine what the Constitution means in the context of this nationwide system of administering punishment by setting the case at bar for argument and plenary consideration.[12]

October 14, 1988

Respectfully submitted,

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[12] If the Court desires to consider together all of the important constitutional questions raised in connection with punitive damage awards, this case should be set for argument in tandem with *The Goodyear Tire & Rubber Co.* v. *Hodder*, No. 88-___, *pet. for cert. filed*, Oct. 14, 1988, in which counsel for Metromedia herein are also counsel for petitioner Goodyear.

APPENDIX

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

No. B022890
(Super. Ct. No. C173233)

APRIL ENTERPRISES, INC.,
Plaintiff and Respondent,

v.

KTTV and METROMEDIA, INC., and DOES 1 through 50, inclusive,
Defendants and Appellants,

APPEAL from a judgment of the Superior Court of Los Angeles County. Billy G. Mills, Judge. Affirmed.

Gibson, Dunn & Crutcher, Dean Stern and Jody E. Porter for Defendants and Appellants.

Hurley, Grassini & Wrinkle and Roland Wrinkle for Plaintiff and Respondent.

Defendants appeal from a judgment awarding plaintiff $17.8 million damages resulting from defendants destruction of 288 videotapes of the Winchell-Mahoney Time show, a popular children's television program of the 1960's. We affirm the judgment.

HISTORY OF THIS LITIGATION

Paul Winchell, a well-known entertainer and ventriloquist, entered into an agreement with defendants KTTV

and its parent company, Metromedia, Inc., to produce a children's television series called "Winchell-Mahoney Time."[1] The agreement covered production and original broadcast of the shows over KTTV as well as syndication in other markets.

Winchell produced at least 288 Winchell-Mahoney Time shows for defendants. These shows were preserved on videotape and stored at KTTV so they would be available in order to exploit the market for syndication.

In 1969, a dispute arose between the parties over future broadcast rights to the tapes. This dispute was never resolved. In 1972 defendants erased all 288 Winchell-Mahoney Time videotapes. Defendants claimed erasure was authorized under a 1965 contract between them and Winchell.

Winchell did not discover the destruction of the tapes until 1976. Shortly after being advised the tapes had been erased Winchell sued defendants for breach of contract and breach of the fiduciary duty of a joint venturer.

At the first trial of this lawsuit, the court granted defendants' motions for judgment on the pleadings and nonsuit on the grounds the complaint failed to state a cause of action and, even if it did, the causes of action were barred by the statute of limitations.

We revervsed, the judgment of dismissal in *April Enterprises, Inc.* v. *KTTV* (1983) 147 Cal.App.3d 805, (hereinafter *April I*) and remanded "for a full development of the facts through a trial of the action . . . consistent with the views expressed in this opinion." (*Id.* at p. 833-834.) Those views, insofar as they are pertinent to the present appeal, were as follows:

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[1] April Enterprises, the nominal plaintiff in this action, is a corporation owned by Winchell and was the actual contracting party. Both sides recognize Winchell as the de facto plaintiff in this action and we will refer to him as such in this opinion.

1. Breach Of The Implied Covenant Of Fair Dealing

In reviewing the 1965 contract between Winchell and defendants we found an inherent contradiction between the erasure and syndication provisions. The erasure provision purported to allow defendants to erase the tapes "six months from the date of broadcast" while the syndication provision allowed Winchell the right to "initiate the licensing of the Program(s) . . . for telecasting by other stations. . . ." We pointed out the obvious: it would be senseless for Winchell to negotiate syndication if he could not be assured availability of the tapes. (*April I, supra,* 147 Cal.App.3d at p. 816.) Therefore, we held, unless defendants can produce extrinsic evidence which resolves the conflict in a way which favors an absolute unqualified right to erase the tapes, the conflict is to be reconciled by limiting defendants' right to erase the tapes to the situation where future syndication was not feasible. (*Id.* at p. 817.)

2. Breach Of Fiduciary Duty By A Joint Venturer

In *April I* we focused on what Winchell must prove to establish a joint venture in the syndication of the programs. We held he could establish the requirement of a joint interest in a common business by proof the parties planned to co-produce the shows in order to exploit the market for syndication and that each party contributed its own unique talents in furtherance of this objective. (147 Cal.App.3d at p. 819.) We held he could establish the requirement of shared profits and losses by proof his losses would be in the form of loss of labor. (*Id.* at p. 820.) We held the requisite joint control could be proved by evidence the parties agreed to equal rights to initiate syndication of the show. (*Id.* at p. 819.) We specifically held labeling Winchell an "independent contractor" in the 1965 contract did not foreclose a finding of joint venture if the conduct of the parties otherwise supports such a finding. (*Id.* at p. 820.) We also specifically held the absence of an agree-

ment to share losses does not preclude a finding of joint venture where one party contributes labor and the other party contributes money. (*Id.* at p. 819.)

FACTS AND PROCEEDINGS BELOW

(APRIL II)

The central issue in this case is, and always has been, whether defendants had the right under the 1965 contract to erase the tapes when they did or whether that right was subject to an implied covenant of good faith and fair dealing which precluded erasure of the tapes so long as syndication was still feasible. The case went to the jury on three theories of liability: breach of fiduciary duty by a joint venturer; breach of the covenant of fair dealing implied in the 1965 contract and in an alleged 1968 agreement between the parties; tortious breach of the implied covenant of good faith and fair dealing. The jury found for Winchell on all three claims awarding him $3.8 million in compensatory damages and $14 million punitive damages.

Because this is an unpublished opinion and the parties are familiar with the facts we will dispense with their recitation here. To the extent they are relevant the facts are discussed in our resolution of the issues below.

QUESTIONS PRESENTED AND DECIDED

Defendants raise numerous issues in this appeal, some of which we need not reach in affirming the judgment below. For example, we hold there was sufficient evidence to support a finding erasure of the tapes violated the implied covenant of fair dealing in the 1965 contract. Therefore, we need not determine whether erasure also violated an agreement alleged to have been made in 1968.

We hold there was sufficient evidence to support a finding of a joint venture in the syndication of the show and

defendants' destruction of the tapes was a breach of fiduciary duty. Such a breach serves as the basis for an award of punitive damages. Therefore, we need not determine whether there was also a tortious breach of the covenant of good faith and fair dealing.

The jury's implied finding Winchell did not acquiesce in the destruction of the tapes and its award of compensatory and punitive damages are supported by substantial evidence. No errors of law or jury misconduct were committed with respect to the damage awards.

DISCUSSION

I. SUBSTANTIAL EVIDENCE SUPPORTS A FINDING DEFENDANTS BREACHED THE IMPLIED COVENANT OF FAIR DEALING IN THE 1965 CONTRACT.

In *April I* we discussed the inconsistency between the erasure and syndication provisions of the 1965 contract. We found those provisions "inherently contradictory." (147 Cal.App.3d at p. 816.) "Taken literally, the contract would allow [defendants] to erase a videotape either at the same time [Winchell] was negotiating a syndication agreement, or after such an agreement had been reached." (*Ibid.*) We found, in *April I*, the conflicting terms of the 1965 contract could be reconciled by construing the erasure clause to be limited by the implied covenant of fair dealing. (*Id.* at p. 817.) We held, therefore, defendants' right to erase the tapes should be interpreted as limited to the situation where future syndication was not feasible *unless* at trial defendants could produce extrinsic evidence which explained the apparent contradictions between the erasure and syndication provisions in some way which favored an absolute unqualified right to erase the tapes. (*Ibid.*) Defendants failed to produce such evidence.

Defendants attempted to reconcile the erasure and syndication provisions in three ways. First, they produced evidence the length of the retention period was bargained

for by the parties. Second, they attempted to show six months was a reasonable period in which to accomplish syndication. Third, they produced evidence that once a syndication agreement was made existing tapes would not be erased during the term of the agreement. For the reasons set forth below, defendants' attempt to reconcile the erasure and syndication provisions failed.

While it is true Winchell and defendants bargained over the erasure provision—eventually extending the retention period to six months instead of the four months defendants originally proposed—they also bargained over the syndication provision which was not included in defendants' original contract proposal to Winchell. The most this evidence shows is that the parties' bargaining resulted in inconsistent provisions being inserted in the contract. Defendants produced no evidence of things said or done at those bargaining sessions which tended to reconcile the provisions "in some way which favors an absolute unqualified right to erase the tapes. . . ." (*April I, supra,* 147 Cal.App.3d at p. 817.)

Defendants also failed to produce evidence that would support a finding six months was a reasonable time in which to accomplish a syndication agreement.

Defendants called two witnesses on this point: Charles Young, former vice president and general manager of defendant KTTV, and Ira Goldstein, former assistant general counsel of defendant Metromedia.

Young testified a syndication deal could be put together in a matter of hours or it could take a month, two months or longer. Young admitted, however, he had nothing to do with syndication at KTTV and had no knowledge of the syndication of Winchell-Mahoney Time. The vast majority of Young's experience, 33 years, was at KTTV where he had nothing to do with syndication.

Goldstein, on the other hand, was experienced in syndicating television programs. He testified *after an inter-*

ested syndicator is found it takes between "a few weeks" and "a few months" to "work out the basic terms of the deal." He went on to say after the "basic deal" has been worked out it would take "a month to a year" to finalize the agreement. (*Id.* at pp. 4-7.) Asked where most agreements tended to fall on the scale—closer to a month or closer to a year—Goldstein replied, "I'd say more toward the year end." (*Id.* at pp. 15-17.) Only two or three agreements out of fifteen to twenty in Goldstein's experience had been finalized in a month. (*Id.* at pp. 18-22.) Although Goldstein testified six months was sufficient time to negotiate a syndication agreement, it is clear from his testimony he was referring to the time after a potential syndicator was located. Goldstein had no opinion on how long it might take to locate a syndicator.

Testimony that once a syndication agreement was made the tapes would be preserved was valueless in interpreting the erasure provision. Winchell sought damages for defendants' destruction of his opportunity to syndicate the tapes not for destroying tapes already covered by a syndication agreement. Preservation of tapes in syndication was a nonissue and evidence on that subject irrelevant. Our mention in *April I* that the contract, taken literally, would allow defendants to erase the tapes after a syndication agreement had been reached was only intended to illustrate the conflict between the erasure and syndication provisions.

The jury correctly found defendants breached the 1965 contract because defendants failed to produce extrinsic evidence explaining the contradictions between the erasure and syndication provisions. Defendants' evidence the parties bargained over the length of time before erasure could take place did not resolve the inconsistency between the provisions. Defendants' evidence erasure would not take place if the tapes were covered by a syndication agreement was irrelevant. Defendants' expert witness, Goldstein, testified most syndication agreements take close to a year to

finalize and that while, in his opinion, six months is a reasonable time to reach a syndication agreement he was not counting the time it takes to locate an interested syndicator.

The jury specifically found syndication was feasible at the time defendants destroyed the videotapes—a finding not challenged on appeal. Therefore, defendants were properly found liable for breach of the covenant of fair dealing implied in the 1965 contract.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDING A JOINT VENTURE IN SYNDICATION EXISTED BETWEEN WINCHELL AND DEFENDANTS.

Defendants attack the jury's special finding of a joint venture as being against law and not supported by substantial evidence.

We previously considered and rejected defendants' claim no joint venture could exist as a matter of law. (*April I, supra,* 147 Cal.App.3d at pp. 818-820.) We held a joint venture was not precluded by the integration clause of the 1965 contract because such a venture may be formed by parol agreement or arise from the acts and declarations of the parties. The mere existence of a so-called integration clause does not foreclose examination of the parties' intent. (*Id.* at p. 819; *Gerdlund* v. *Electronic Dispensers International* (1987) 190 Cal.App.3d 263, 270-271.) Similarly, labeling Winchell an "independent contractor" does not foreclose a finding of joint venture if the conduct of the parties otherwise creates such a relationship. (*April I, supra,* 147 Cal.App.3d at p. 820.) Finally, we held the requisite sharing of profit and loss is present if Winchell's loss is in the form of lost labor and defendants' loss is in the form of lost capital. (*Id.* at pp. 819-820.) To the extent defendants' brief on appeal repeats these legal arguments they are, again, rejected.

We turn now to the substantial evidence issue.

The substantial evidence test has not changed from the formulation more than 50 years ago in *Crawford* v. *Southern Pacific Co.* (1935) 3 Cal.2d 427, 429: "In reviewing the evidence on . . . appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. . . . When two or more inferences can be reasonably deducted from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." In the trial of the case before us there was little conflict over the facts but substantial conflict over the inferences to be drawn from those facts. The test, however, is not whether there is a substantial conflict but whether there is substantial evidence to support the inferences that emerged from the conflict.

In *April I* we listed the elements necessary to create a joint venture and discussed the evidence that would establish those elements. (147 Cal.App.3d at pp. 819-820.)

The first element is a joint interest in a common business. (147 Cal.App.3d at p. 819.) We held a common enterprise to seek syndication of the show after it was produced and originally telecast would quality as a joint venture. (*Ibid.*) We also held the requisite joint interest in a common business could be established by evidence the parties planned to co-produce the shows in order to exploit the market for syndication and that each party contributed its own unique talents in furtherance of this objective. (*Ibid.*)

Syndication was planned the first time Winchell met with defendants to discuss the program, in July 1964. The parties discussed a syndication arrangement which would give each party the right to initiate syndication and would provide an equal sharing of profits regardless of which party obtained the syndication contract. Winchell began production the next month on the basis of this discussion while the parties' representatives worked out a written

contract incorporating the terms discussed at the July 1964 meeting.

In April 1965 the parties executed a written agreement covering the Winchell-Mahoney Time show. That agreement was introduced into evidence at the trial. The 1965 contract, in the form of a letter to Winchell, begins: "The following will confirm our understanding in connection with a series of programs in which you are to provide talent, *production* and other services." (Emphasis added.) The contract goes on to list the tasks Winchell will perform "[i]n connection with the *production* of such Program. . . ." (Emphasis added.) These tasks included performing as host, making commercial announcements, furnishing actors, musicians and puppet manipulators, furnishing the ideas, formats and characters for the program. Defendants agreed to "furnish all other elements necessary to *produce*, the programs. (Emphasis added.) The most significant provisions of the contract pertain to syndication. The parties agreed either may initiate the licensing of the programs for broadcast by other television stations and regardless of which party procures the licensing agreement the parties will share equally the net profits.

Defendants elected to terminate production of the program in 1968. At the same time the parties discussed a new agreement to cover syndication of the 288 Winchell-Mahoney Time shows which had been produced and recorded on videotape. The parties hotly dispute whether a syndication contract prepared by defendants in April 1968 ever took effect. We need not resolve that question. As defendants' counsel conceded at oral argument, the termination notice only cancelled the production of new shows under the 1965 contract, it did not terminate the syndication provisions of that contract.

The evidence established the first element of a joint venture: a joint interest in a common business. Winchell's testimony and the 1965 contract showed the parties

planned to co-produce the shows with defendants providing the capital and Winchell providing the labor. The trial court found, and we agree, "the [1965] contract as a whole attempts to divide the responsibilities of the parties in language strongly suggestive of a joint venture." In denying the evidence established a joint interest in a common business, defendants argue Winchell's contribution of labor was but the "exact equivalent" of the labor of a plumber hired to lay pipe. This comparison would be apt only if the plumber received equal control and 50 per cent of the profits from the crops produced by the irrigation system he installed.

The second element of a joint venture is a sharing of profits and losses. (*April I,* 147 Cal.App.3d at p. 819.) Defendants argue this element is not satisfied because the evidence showed Winchell bore no financial risk in the syndication venture. (*Zorich* v. *Petroff* (1957) 152 Cal.App.2d 806, 810.) Rather, Winchell was paid for his labor in producing the shows whether or not they generated a profit. (Cf. *Wiltsee* v. *California Emp. Com.* (1945) 69 Cal.App.2d 120, 127.)

As to defendants first argument, we held in *April I* the requisite sharing of profits and losses is satisfied if the evidence shows Winchell contributed his labor to the syndication venture. " In the event of loss, the party contributing capital loses his capital and the one contributing labor loses the value of his efforts." (147 Cal.App.3d at p. 819.) Winchell testified he brought his reputation and talent to the programs, that he brought the characters, ventriloquist dummies and copyrights pertaining to them, that he contributed to the writing and supervised the writers, that he helped in directing the cast and in make-up and costuming, that he utilized his technical experience in the industry, that he provided gimmicks and ideas, and that he supplied the idea for the clubhouse format and the theme song for the programs. He further testified to his

"creative control" with respect to the content and format of the programs.

As to defendants' second argument, that Winchell was paid in full for his labor by defendants, the fact Winchell received compensation under the 1965 contract for his performance does not, as a matter of law, preclude the existence of a joint venture in the syndication of the programs on which he performed.

The fact a person received compensation for his services from his alleged joint venturer is evidence the relationship was one of employment not joint venture. (*Wiltsee* v. *California Emp. Com., supra,* 69 Cal.App.2d at p. 127.) But, it is not determinative. As Witkin points out, the distinction between a partnership and a joint venture "is not sharply drawn . . . [b]ut the difficulty of classification raises no serious legal problems, for the *incidents* of both relationships are in all important respects the same. . . ." (6 Witkin, Summary of Cal. Law (8th ed. 1974) Partnership, § 16, p. 4268; emphasis in original.) Partners can agree to compensate a partner for his services without destroying the partnership relation. (*Neilsen* v. *Holmes* (1947) 82 Cal.App.2d 315, 324.) We see no reason why members of a joint venture could not agree to the same thing.

In *Wiltsee,* the court did not rule against the existence of a joint venture merely because one of the alleged joint venturers received compensation for his services but because in "the contract here under discussion there can be no doubt at all . . . that Yost was not engaged in any joint venture with respondent. . . ." (69 Cal.App.2d at p. 127.) There are material differences between the contract in *Wiltsee* and the contract between Winchell and the defendants in the case before us. The contract in *Wiltsee* described the relationship between the parties as that of employer-employee and the respondent conceded that this relationship was created. The contract further provided nothing contained in it shall be construed to constitute a

partnership between the parties. Not only was the purported joint venturer not to bear any part of the business' los[s]es, he "in no event [was] to have, any interest in said business or the profits thereof." The fact Yost was to receive 25 per cent of the net profits was explained in the contract "merely as a convenient method of computing the compensation." (*Ibid.*)

Wiltsee demonstrates the importance of looking not at individual factors but the overall intent of the parties in determining whether a joint venture was created. As a student commentator demonstrated, when the individual elements of a joint venture are applied to the facts of *Wiltsee,* a joint venture can be made to appear. (Note, *Unemployment Insurance: Definition of Employee and Employing Unit* (1945) 33 Cal.L.Rev. 648, 650.) However, any such intent was negated by the contract itself which stated it was not to be construed as making the parties partners, described the parties as employer-employee and made every attempt to convey the meaning of an employment relation rather than a joint enterprise. (*Id.* at p. 651.)

Nothing in the 1965 contract between Winchell and defendants precludes a finding they intended to engage in a joint venture with respect to syndication. The provisions labeling Winchell an "independent contractor" and providing him a "minimum guaranteed fee of $1,000 per week" refer only to Winchell's performance on the programs broadcast over KTTV. The syndication provisions convey a different relationship—that of a joint interest in syndication, jointly controlled with profits and losses jointly shared. Defendants argue the 1965 contract cannot be bifurcated along these lines because to do so "would be artificial and utterly inconsistent with basic law governing the interpretation of contracts." However, the basic law of contracts defendant cites, Civil Code section 1641, supports a finding of joint venture. That section reads: "The whole of a contract is to be taken together, *so as to give effect to every part,* if reasonably practicable, each clause

helping to interpret the other." (Emphasis added.) Unlike initiative measures, contracts are not limited to one subject. (See Cal. Const., art. II, § 8, subd. (d).) Nothing in the law prevented the parties from including in the same contract provisions relating to the original broadcasts and syndication of those broadcasts. Nor is there any reason why the parties cannot stand in one relationship as to the original broadcasts and a different relationship as to syndication. Indeed, our Supreme Court addressed this very point in *Nelson* v. *Abraham* (1947) 29 Cal.2d 745, 751 observing, "It is conceivable that the relationship between parties may be, for one purpose, that of employer and employee, while for another, that of partners or joint adventurers."

The final element, joint control, is established by evidence the parties agreed to have equal rights to initiate the syndication of the show. (See *April I, supra,* 147 Cal.App.3d at p. 819.) Defendants do not challenge the sufficiency of the evidence to establish this element.

III. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMPENSATORY DAMAGE AWARD.

A. Winchell Did Not Acquiesce to Destruction of the Tapes.

Defendants argue Winchell never replied directly to their ultimatum that they would destroy the tapes, therefore Winchell acquiesced in their destruction.

In November 1969, Richard Woollen, defendant Metromedia's vice president for programing, wrote to Winchell proposing a new syndication agreement. Defendants sought the right to broadcast Winchell-Mahoney Time in the major markets, New York, Los Angeles, Washington, D.C., Kansas City, Chicago and San Francisco for two years for the flat payment to Winchell of $40,000. Defendants would have two two-year options exercisable upon payment of $25,000 and $15,000 respectively. The letter concluded,

". . . we must either plan on usage or erase all master tapes and record other material on this expensive stock." A month later, December 1969, Woollen wrote Winchell "on or after April 1, 1970, we plan to erase all Winchell-Mahoney program videotapes. . . ."

In late 1969 or early 1970 Winchell had three meetings with Woollen. At the first meeting Winchell advised Woollen he had been contacted by Cris-Craft Broadcasting which was "very, very interested" in syndicating the program. Woollen merely "shrugged." Winchell then offered to buy the tapes from defendants for $50,000. Woollen rejected that offer on the ground the tapes as reusable stock were worth more than that. Winchell went back a second time and offered Woollen $50,000 cash plus a new reel of videotape for each Winchell-Mahoney Time tape. Woollen rejected this offer on the ground if the show turned up on a competitor's television station it would be very upsetting to defendants' management and stockholders. Winchell went back a third time and offered Woollen $50,000 plus the replacement tapes plus an agreement that if the program were syndicated it would not be shown in Los Angeles. Woollen's reply was, "no deal." Winchell testified when he originally met with Woollen it was with the idea he and defendants would work together on a syndication deal with Cris Craft. It was only because Woollen literally shrugged off the syndication possibility Winchell made the offer to buy the tapes.

Following the third and last meeting between Winchell and Woollen, in which Woollen rejected Winchell's offer to buy the tapes for $50,000, provide KTTV with blank tapes and not to show the program in Los Angeles, Woollen sent Winchell a letter Woollen described as an "ultimatum" demanding Winchell either agree to defendants' earlier syndication proposal or the tapes would be erased. The letter acknowledged Winchell could make a counteroffer but unless the counteroffer was acceptable to defendants "the tapes will nevertheless be erased. . . ."

Woolen's letter also told Winchell even if he did enter into an agreement with defendants, defendants would erase the tapes 30 days after the expiration of their rights. Furthermore, Woollen told Winchell "our management has decided not to sell you the tapes at any price."

It is true Winchell did not respond directly to defendants' threat to destroy the tapes by saying "That would be a breach of the covenant of good faith and fair dealing" or even "You have no right to do that." However, the issue is not whether there was evidence that could have supported a finding of acquiescence. The issue is whether there is substantial evidence to support the jury's implied finding Winchell did *not* acquiesce in defendants' erasure of the tapes.

The jury could reasonably find from the evidence described above Winchell neither wanted the tapes destroyed nor was indifferent toward their destruction. Winchell did not behave passively when defendants threatened to destroy the tapes. He attempted to interest defendants in a syndication deal with Cris Craft or in selling the tapes to him. He was curtly rebuffed. Woollen admitted at trial it would be reasonable to assume a person who acted as Winchell did would not want the tapes destroyed.

Defendants, on the other hand, appeared inflexible in their ultimatum Winchell must either agree to their syndication proposal or they would destroy the tapes. Although in their last letter to Winchell defendants offered to consider a counterproposal, the tone of the letter did not suggest any such proposal was likely to be accepted. Furthermore, the letter clearly states any agreement between the parties would only postpone, not prevent, destruction of the tapes. The jury could reasonably find that short of a commando-like raid on the vaults of KTTV there was nothing Winchell could do to prevent the tapes' destruction.

Winchell could also reasonably have believed Woollen's threat to erase the tapes was a bluff. Woollen testified threats, bluffs and deadlines are "a customary practice in the business of . . . acquiring rights to broadcast programs." Winchell, an experienced television producer and performer, could have been aware of such techniques. Such a belief would have been reinforced by defendants' 1969-1970 letters in which the date of erasure moved back slightly and the payment to Winchell increased slightly between the first and last letters. Indeed, Woollen testified the threat to erase the tapes started out as a bluff—a technique to get negotiations going. Later, according to Woollen's testimony, the bluff turned real as defendants decided to show Winchell the consequence of not agreeing to their demands.

Finally, in order for defendants to invoke the maxim, "Acquiescence in error takes away the right of objecting to it" (Civ. Code, § 3516) they must show detrimental reliance on Winchell's alleged acquiescence. (*Matteson* v. *Bank of Italy* (1929) 97 Cal.App. 643, 647-648.) None is shown here. Defendants argue on appeal if Winchell had notified them of his claim they had no right to erase the tapes they would at least have had the opportunity to review his claim. However, the evidence showed the letters threatening to erase the tapes were reviewed by defendants' legal staff before they were mailed and there was no testimony at trial to support defendants' argument on appeal they might have reconsidered erasing the tapes if Winchell, who is not a lawyer, had specifically claimed they had no right to do so.

The more appropriate maxim for this case is "Law does not require idle acts." (Civ. Code, § 3532.) From the letters to Winchell, in tone and content; Woollen's reaction to Winchell's attempt to pursue syndication or purchase the tapes; defendants' determination to erase the tapes as a lesson to Winchell; and the absence of any testimony defendants might have changed their minds, a jury could

reasonably determine Winchell's protest would have been an idle act. (See *Cox* v. *Delmas* (1893) 99 Cal. 104, 121.)

B. The Jury Could Award Damages Representing Profits Lost on Ventures Other Than Syndication to Commercial Television.

Defendants argue the court erred in allowing the jury to consider Winchell's loss of revenue from cable television, videocassettes, records, audiotapes, books, magazines and paraphernalia associated with the program and its characters. They contend Winchell's rights were limited to a share in the proceeds from syndication or licensing on commercial television stations. We do not view the parties' agreement as so restrictive.

Throughout the trial witnesses for the parties referred to broadcast rights, licensing and syndication as though the terms were interchangeable. Assuming there are differences in these terms, they were never explained to the jury nor given any significance by the parties. For example, the 1965 contract provides, "Either party may initiate the licensing of the Program. . ." but the only agreement executed under that provision, the agreement with Four Star, is repeatedly referred to by defendants and Winchell as a "syndication." On the other hand, defendants' 1970 contract proposal refers to broadcast and syndication of the shows but makes no mention of "licensing."

Several rules of contract construction provide guidance as to the rights of the parties beyond the original telecasts of the program. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code, § 1647.) "However broad may be the terms of a contract, it extends only to those things concerning

which it appears that the parties intended to contract." (Civ. Code, § 1648.)

As we previously held, the evidence supports a finding the parties intended not only to broadcast the program in Los Angeles over KTTV but to exploit the market for the program beyond KTTV. Whether it be labeled licensing, syndication, broadcast or some other term, marketing the program to cable television and videocassette companies is clearly consistent with the mutual intent of the parties at the time they formed the joint venture. The fact cable television and videocassettes were never specifically mentioned by the parties is explained by the fact those markets did not exist in 1964. (See *Cohen* v. *Paramount Pictures Corp.* (9th Cir. 1988) 88 Daily J. D.A.R. 5262, 5264.) Nevertheless, construing the joint venture agreement to include cable television and videocassettes does not extend the terms of the agreement beyond the parties' intention to "initiate the licensing of the Program. . ."

The revenue Winchell would have received from the sale of records, books, Jerry Mahoney puppets and the like was compensable as a foreseeable result of defendants' breach. (Civ. Code, § 3300; cf. *DC Comics* v. *Filmation Associates* (S.D.N.Y. 1980) 486 F. Supp. 1273, 1281-1282.) The testimony at trial showed during the years Winchell-Mahoney Time was broadcast, Winchell made a substantial amount of money from products associated with the show. This surely did not escape defendants' attention. In addition, expert testimony was introduced as to the value to Winchell of the sale of those products had the videotapes not been destroyed. Finally, a market for the program on videocassette and cable television was reasonably foreseeable to defendants when they destroyed the tapes in 1972.

C. The Compensatory Damages Are Not Excessive or Based on Passion or Prejudice.

In assessing defendants' claim the compensatory damages are excessive, we bear in mind proof of damages in

this case necessitated an estimation of profits that never came to fruition. As we noted in *April I*, defendants not only deprived Winchell of some golden eggs, they killed the goose. Because defendants occasioned the harm, they must bear the risk of uncertainty as to what the profits might have been. (*Donahue* v. *United Artists* (1969) 2 Cal.App.3d 794, 804.)

Defendants contend the jury used an improper method to calculate a portion of Winchell's compensatory damages. This argument is based on jurors' declarations that in computing compensation for lost syndication revenues, the jury decided to utilize the $50,000 defendants offered Winchell in March 1970 as the base line. Defendants argue this was an improper measurement of damages because the $50,000 was offered for broadcast rights over stations owned by Metromedia. Syndication revenues were covered in a different paragraph of the letter offering Winchell 50 per cent of the net profits from licensing the program on stations other than Metromedia stations. The trial court admitted these declarations at the hearing on defendants' motion for new trial but denied the motion without comment.

The first question is whether the jurors' declarations describing how they reached their verdict can even be considered by the court. Evidence Code section 1150 reads as follows:

> "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or

> dissent from the verdict or concerning the mental processes by which it was determined.
>
> "(b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

In *Krouse* v. *Graham* (1977) 19 Cal.3d 59, 80, the court explained, "... section 1150 properly distinguishes between 'proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved ...' "

The following juror declaration is typical of those filed in the case before us:

> "[O]n the breach of contract, we started our deliberations using the amounts offered in Metromedia's March 31, 1970, letter to April in which Metromedia made offers on April for further use of the programs as a basis for calculation.
>
> "We then calculated the value of that offer, adjusting for inflation and realized that even using that minimum figure, the Plaintiff had lost $500,000.
>
> "As we further discussed the damages, various figures were discussed ranging from the $500,000. [sic] that we had determined was the minimum to amounts in excess of $5,000,000."

Defendants argue the jurors' declarations report an overt, objectively verifiable act: what the jurors discussed. Winchell argues the declarations report the jurors' mental processes: how they arrived at the total award, starting with defendants' $50,000 offer as a base. Separating "overt acts" from the jury's "reasoning process" is not always an easy task. (Cf. *Drust* v. *Drust* (1980) 113 Cal.App.3d 1, 8-9 with *Ferreira* v. *Quik Stop Markets, Inc.* (1983) 141

Cal.App.3d 1023, 1033-1034.) We conclude the declarations were admissible insofar as they reported an overt, objectively ascertainable act: that the jury expressly agreed to base a portion of the damages on defendants' $50,000 offer. This is not evidence of what a juror "privately considered" in arriving at her verdict. Rather, it is evidence of an open discussion and agreement between the jurors on a base line for one component of damages. (Cf. *Krouse* v. *Graham, supra,* 19 Cal.3d at p. 81; *Smith* v. *Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 517.)

The next question is, was the jury's use of defendants' $50,000 offer prejudicial error. We conclude it was not.

The purpose of admitting jurors' declarations about misconduct is to free the court "to determine the substantive questions of whether the particular misconduct is a recognized ground for new trial and whether it has prejudiced the losing party." (*People* v. *Hutchinson* (1969) 71 Cal.2d 342, 350.) The jury's conduct in the case before us was neither malum in se nor malum prohibitum. The declarations do not show the verdict was based on bias or prejudice (cf. *Clemens* v. *Regents of University of California* (1971) 20 Cal.App.3d 356, 363) or on factors such as attorneys' fees or the result of chance which for policy reasons a jury cannot consider. (*Krouse* v. *Graham, supra,* 19 Cal.3d at p. 81; Code of Civ. Proc., § 657, ¶ 2) Assuming the jury erred, its error was at most a misinterpretation of defendants' March 1970 letter. But, if the jury did not "correctly" interpret the evidence offered by defendants the blame would seem to lie with the defendants who proffered the evidence and had the opportunity to argue to the jury how the evidence should be interpreted. (Cf. *Aronowicz* v. *Nalley's Inc.* (1972) 30 Cal.App.3d 27, 41.)

Furthermore, even when a jury has engaged in prohibited conduct in arriving at its verdict, reversal is not compelled. For example, when jurors agree to award damages

based on an average of the amount voted by each juror, the result is a verdict based on chance prohibited by Code of Civil Procedure section 657, paragraph 2. However, it is not improper for jurors to calculate such an average amount as a basis for discussion if there is a later consideration of the amount and a vote upon it, even if the jurors end up voting for the averaged amount. (*Glass* v. *Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 435.) In our case the declarations show the jurors used the $50,000 offer as a basis for discussion but that various figures ranging from $500,000 to more than $5 million were discussed.

If any party suffered prejudice from the jury's use of the $50,000 offer it was Winchell. He testified the value of his syndication rights was $15 million. His expert witness testified Winchell's syndication rights in the programs would be worth $2.5 million a year in the current marketplace not counting cable television or videocassettes. Thus, the formula used by the jury to calculate Winchell's damages actually reduced his award.

Defendants also argue the verdict was the result of passion or prejudice. They complain that while Winchell used his "prowess as an entertainer" to "captivate" the jury, defendants were "clearly . . . unpopular" because of their erasure of the videotapes and became more unpopular as a result of Woollen's testimony about "ultimatums", "negotiating techniques" and how destroying the tapes "showed" Winchell defendants meant what they said.

There is no merit to the contention a plaintiff's personal charm or attractiveness impermissibly prejudices a jury. (*Bigboy* v. *County of San Diego* (1984) 154 Cal.App.3d 397, 409.) By the same token, we know of no authority holding the plaintiff cannot introduce relevant evidence of defendants' conduct because the jury may find that conduct disdainful. The very essence of Winchell's case was that defendants acted in bad faith and dealt unfairly with him. It was defendants' own vice president, Woollen, who

provided the evidence to support that claim. The fact Woollen may have given the jury a very poor impression of the way defendants did business supports rather than refutes the jury's finding of liability. The damage award is supported by the evidence. We find no basis in the record for holding Winchell's conduct or Woollen's testimony caused the jury to award excessive damages.

IV. THERE WERE NO ERRORS IN THE PUNITIVE DAMAGES AWARD.

Defendants challenge the punitive damages award on four grounds: (1) allowing Winchell to demonstrate his talent as a ventriloquist was unduly prejudicial; (2) the employees responsible for erasing the tapes and station KTTV are no longer associated with defendant Metromedia; the trial court erred in allowing Winchell to increase his claim for punitive damages after trial; California's punitive damages procedure is unconstitutional. We reject these challenges.

A. Allowing Winchell to Perform Briefly for the Jury Was Not Unduly Prejudicial to Defendants

Before allowing Winchell to give the jury a brief sample of his skill as a ventriloquist, the trial court heard argument from counsel on the relevancy and potential prejudice of this demonstration. Defendants contended at trial the tapes were valueless at the time they were destroyed because the show was old-fashioned and outdated. Winchell contended the shows still had entertainment value and he could use his skills to promote their broadcast or sale on videocassette. The trial court found Winchell's performance before the jury was relevant to the present marketability of the show. The court dealt with the prejudice objection by requiring Winchell to submit a script in advance for the court's approval to ensure "there is no charged language or . . . anything else that could excite or endear or otherwise influence the jury relative to matters that otherwise would be immaterial in this case."

We believe the trial court properly allowed Winchell's demonstration. Winchell's present ability to perform was relevant to the market value of the tapes. There was testimony that value would depend, in part, on Winchell's ability to promote them. The jury could reasonably infer if Winchell can perform today he could perform in 1969-1970 when the parties last negotiated over rights to the tapes and in 1972 when the tapes were destroyed.

There is nothing novel about an in-court demonstration to aid the jury in understanding the evidence. (See Evid. Code, § 140; *People* v. *McDaniel* (1976) 16 Cal.3d 156, 174-175; *People* v. *Jacobs* (1987) 195 Cal.App.3d 1636, 1656.) By setting specific ground rules for the demonstration and reviewing Winchell's script in advance, the trial court took reasonable precautions to ensure Winchell's performance was a demonstration of his skills and not an appeal to the emotions of the jury. Defendants have not cited any particular portion of the demonstration as unduly prejudicial and in our review of the transcript we have found none.

B. Metromedia Was Responsible for the Decision to Erase the Tapes.

We find no merit in Metromedia's claim it should not be liable for punitive damages because "[n]one of the people involved are any longer employed by Metromedia" and Metromedia had sold KTTV by the time of the trial. First, defendants misstate the evidence. The evidence only showed Woollen and Goldstein were not employed by Metromedia at the time of the trial. However, Woollen testified the decision to erase the tapes and the decision not to sell the tapes to Winchell at any price were not made by him. They were the decisions of Metromedia's "management" in which Woollen concurred. The evidence does not reveal which persons in Metromedia's "management" made these decisions much less whether they are still employed by Metromedia. Moreover, Woollen testified he was a vice-president of Metromedia, not KTTV, and the de-

cisions regarding the tapes were made by Metromedia's management, not KTTV's. He testified further everything he did with respect to the threats, the ultimatum and the actual erasure of the tapes he did in his managerial capacity as a Metromedia vice president with the approval of Metromedia's president.

C. The Trial Court Properly Allowed an Amendment to the Complaint to Increase the Claim for Punitive Damages.

Next, defendants contend the trial court erred in allowing Winchell to amend his complaint, after the case was submitted to the jury, to increase the amounts claimed as punitive damages from $10 million to $14 million. Defendants argue that, except in cases where there is a codified measure of damages, a plaintiff cannot recover more than the amount of its prayer. Defendants cite as authority *Meisner* v. *McIntosh* (1928) 205 Cal. 11 and *Crofoot* v. *Blair Holdings Corp.* (1953) 119 Cal.App.2d 156.

Meisner and *Crofoot* do not support defendants' argument. These cases hold in the absence of an amendment the plaintiff cannot recover damages in excess of the amount alleged in the complaint. (*Meisner* v. *McIntosh, supra,* 205 Cal. at p. 13; *Crofoot* v. *Blair Holding Corp., supra,* 119 Cal.App.2d at p. 195.) Where the plaintiff has proved damages in excess of the amount alleged in the complaint the remedy prescribed in *Meisner* and *Crofoot* is a motion to amend the complaint to conform to proof. (*Meisner, supra,* 205 Cal. at p. 12; *Crofoot, supra,* 119 Cal.App.2d at pp. 195-196.) Winchell made such a motion and the trial court granted it.

Amendments to conform to proof after trial are liberally permitted. (See 5 Witkin, Cal. Procedure (1985), Pleading, §§ 1134, 1139, pp. 549, 553-556 and cases cited.) Defendants do not claim judgment on the amended complaint was rendered without affording them an adequate opportunity to present evidence or argument on the amount

of punitive damages. Therefore, we find no error in allowing the amendment.

D. The Procedure for Awarding Punitive Damages Is Not Unconstitutional.

Finally, defendants claim it was unconstitutional to assess punitive damages against them without affording them "the safegaurds normally associated with penal-type proceedings." They also admit this claim has been rejected by our Supreme Court. (*Peterson* v. *Superior Court* (1982) 31 Cal.3d 147, 161; see also *Downey Savings & Loan Assn.* v. *Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1101.) Those decisions are dispositive on this issue.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

LILLIE, P.J.

REESE, J.*

*Assigned by the Chairperson of the Judicial Council.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: / DATE: 06/09/88

Gibson, Dunn & Crutcher
Timothy G. Fielden
333 So. Grand Ave
Los Angeles, CA. 90071

RE: April Enterprises, Inc.
vs.
KTTV and Metromedia, :re.
2 Civil 302289C
Los Angeles NO. C973233

APENDIX B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 7 DATE: 07/06/88

Gibson, Dunn & Crutcher
Timothy G. Fielden
333 So. Grand Ave
Los Angeles, CA. 90071

RE: April Enterprises, Inc.
vs.
Kttv and Metromedia, Inc.
2 Civil B022890
Los Angeles NO. C173233

THE COURT:

Petition for rehearing denied.

RECEIVED
JUL 07 1988

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 2.

OFFICE OF THE COUNTY CLERK
Los Angeles County
111 North Hill Street
Los Angeles, CA. 90612

RE: April Enterprises, Inc.
vs.
Kttv and Metromedia, Inc.
2 Civil B022890
Los Angeles NO. C173233

FILED
SEP 14 1988
Frank S. Zolin, County Clerk

****REMITTITUR****

I, Robert N. Wilson, clerk of the Court of Appeal of the State of California, for the Second Appellate District, do hereby certify that the attached is a true and correct copy of the original order, opinion or decision entered in the above-entitled cause on 06/09/88 and that this order, opinion or decision has now become final.

* * * Affirmed In Full. * * *

____ Appellant X Respondent to recover costs.
____ Second party to bear our costs.
____ Costs are not awarded in this proceeding.

APPENDIX C

ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 7, No. B022890 8006361

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

APRIL ENTERPRISES, INC.,

Respondent,

v.

KTTV & METROMEDIA, INC., et al.,

Appellants.

FILED
AUG 31 1988

Appellants' petition for review DENIED.

The request for an order directing publication of the opinion in the above-entitled cause is DENIED.

Lucas, C.J., is of the opinion the petition should be granted.

/s/ LUCAS
Chief Justice

APPENDIX D

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 7 DATE: 09/23/88

Gibson, Dunn & Crutcher
Timothy G. Fielden
333 So. Grand Ave
Los Angeles, CA. 90071

RE: April Enterprises, Inc.
VS.
KTTV and Metromedia, Inc.
2 Civil 5022390
Los Angeles NO. C173233

THE COURT:

APLT'S MOTION TO RECALL THE REMITTITUR IS DENIED.
SEP 23 1988

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES**

**CASE NUMBER
C 173 233**

APRIL ENTERPRISES, INC., ET.AL.
PLAINTIFF(S)

vs.

KTTV METROMEDIA, ET.AL.
DEFENDANT(S)

Filed Jul 2 1986
Frank S. Zolin, County Clerk

JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial on JUNE 3, 1986, in Department 35 of the Superior Court, the Honorable BILLY G. MILLS Judge Presiding; the plaintiff(s) appearing by attorney(s)

LAWRENCE P. GRASSINI

and the defendant(s) appearing by attorney(s)

DEAN STERN

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to wit:

(OVER)

(Here quote entire Special Verdict verbatim)

TITLE OF COURT AND CAUSE

We the jury in the above-entitled action find in favor of the party as indicated below as to each of the three claims presented to us:

AS TO PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT

We find in favor of:
(check one:) _X_ The Plaintiff
__ The Defendants;
and against:
(check one:) __ The Plaintiff
_X_ The Defendants;
(If your verdict is in favor of the Plaintiff, state the following:) and assess damages against the Defendants as follows:

$3,800,000

AS TO PLAINTIFF'S CLAIM BASED ON BREACH OF FIDUCIARY DUTIES OF JOINT VENTURERS

We find in favor of:
(check one:) _X_ The Plaintiff
__ The Defendants;
and against:
(check one) __ The plaintiff
X The Defendants;
(If your verdict is in favor of the Plaintiff, state the following:) and assess damages against the Defendants as follows:

Compensatory damages: $3,800,000
Punitive damages: $14,000,000 (14 Million)

AS TO PLAINTIFF'S CLAIM THAT THE DEFENDANTS UNREASONABLY BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

We find in favor of:
(check one:) _X_ The Plaintiff
__The Defendants;
and against:
(check one:)_ The Plaintiff
__ The Defendants;

(If you find in favor of the Plaintiff, state the following:)
and assess damages as follows:

Compensatory damages:	$3,800,000
Punitive damages:	$14 Million

Dolores S. Henderson
Foreperson

7/2/86
Dated

APPENDIX E

TUESDAY, OCTOBER 11, 1988

* * *

ORDERS IN PENDING CASES

* * *

A-242 METROMEDIA, INC., ET AL. V. APRIL ENTERPRISES, INC.

The application for stay presented to Justice O'Connor and by her referred to the Court is granted and it is ordered that the judgment of the Court of Appeal of California, Second Appellate District, case No. B022890, entered June 9, 1988, is stayed pending the timely filing and disposition of a petition for writ of certiorari. In the event the petition for a writ of certiorari is denied, this order terminates automatically. Should the petition for a writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court. This order is further conditioned upon the bond presently in force remaining in effect. Justice Stevens took no part in the consideration or decision of this order.

* * *

APPENDIX F

GIBSON, DUNN & CRUTCHER
DEAN STERN
TIMOTHY G. FIELDEN
333 South Grand Avenue
Los Angeles, California 90071

(213) 229-7000

Attorneys for Defendant
Metromedia, Inc. for itself and for Station KTTV, a former portion of Metromedia Television Division

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

CASE NO. C 173 233

APRIL ENTERPRISES, INC., a corporation,
Plaintiff,

vs.

KTTV and METROMEDIA, INC., and DOES 1 through 50,
Defendants.

REPLY TO OPPOSITION TO MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL

Date of
Hearing: August 28, 1986
Time: 9:00 a.m.
Dept.: 35
FILED 8-26-88

In light of April's 55-page opposition, and the accompanying juror Declarations, Metromedia files this reply.

* * * * * *

V

THE PUNITIVE DAMAGE AWARD VIOLATED METROMEDIA'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION

[23] The United States Supreme Court recently recognized, that the constitutionality of punitive damages "raise[s] important [24] issues which, in an appropriate setting, must be resolved. . . ." *Aetna Life Insurance Co. v. Lavoie,* No. 86-1601, slip op., at p. 14 (April 22, 1986). This case demonstrates the unconstitutional nature of punitive damage, which can be imposed arbitrarily by a jury, under vague standards, in an amount far beyond the punishment necessary to serve any legitimate purpose. Metromedia requests that this Court consider the constitutionality of punitive damages, and strike down the $14 million award as impermissible and excessive.

April received a windfall which exceeded its compensatory damages by over $10 million. This massive bounty cannot be reconciled with the excessive fines clause imposed on the states under the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment of the United States Constitution, as well as the California Constitution. The Eighth Amendment expressly prohibits excessive fines, as does Article I, § 17 of the California Constitution. The United States Supreme Court has held that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham v. Wright,* 430 U.S. 651, 669 n.37 (1977). Punishment administered in non-criminal proceedings has previously been found to warrant application of the Eighth Amendment. *Trop v. Dulles,* 356 U.S. 86 (1958); *In Re Gault,* 387 U.S. 1 (1967). Indisputably, the purpose of the $14 million punitive damage award against Metromedia

unequivocally follows the classic purposes of criminal punishment. California Code of Civil Procedure Section 3294 [25] specifically indicates that the purpose of punitive damages is to punish the defendant and make an example of that party to deter similar conduct. The penal nature of these damages necessitates application of the constitutional safeguard against excessive fines in certain civil proceedings such as the case at bar.

The punitive award also constitutes invidious discrimination against Metromedia which was subjected to an open-ended punitive damage award, while the federal state legislatures have frequently limited the amount of monetary punishment which can be imposed in both civil and criminal proceedings. The exposure to open-ended damages, therefore, violated Metromedia's right to Equal Protection under the Fourteenth Amendment, as well as California Constitution Article I, § 7.

The huge punitive damage award grossly exceeds fines levied against defendants in California criminal proceedings for acts unequivocally more egregious than the erasure of videotapes, which Metromedia owned. The California Penal Code is ripe with examples of criminal offenses punishable by a dollar amount no greater than $10,000. Section 490 permits a $1,000 fine for petty theft. Section 499(c) authorizes a $5,000 fine for theft of trade secrets. Furthermore, Section 496 permits treble damages to be imposed against a party found guilty of receiving stolen property. Additionally, Section 672 authorizes fines no greater than $1,000 for misdemeanors, and $10,000 for felonies, if no fine is prescribed in the statute under which the felony is classified. This Section would apply to crimes such as destroying a written instrument under Penal Code Section 617, or destruction [26] of a work of art under Penal Code Section 622. In contrast, Metromedia was assessed $14 million in punitive damages for erasing videotapes which it firmly believed were its own property pursuant to the 1965 Agreement.

Punitive damages, by definition, transfer from one litigant to another a monetary recovery "in excess of . . . actual loss." *Scott v. Donald,* 165 U.S. 58, 86 (1897). Under the Due Process Clause, property rights may be affected, or a person punished, only after Due Process has been observed. *Ingraham v. Wright,* 430 U.S. 651, 672. The punitive damages awarded in this case violate the Due Process Clause because they confiscate a huge amount of Metromedia's property and transform it into an extraordinary monetary windfall to April. This enormous bounty, however, was imposed as a penal fine without affording Metromedia the traditional rights required in a criminal or quasi-criminal proceeding. *Wade v. Smith,* 461 U.S. 30, 59 (Rehnquist, J. dissenting).

It is fundamental that Due Process requires that states impose no punishment on an individual without first observing all of the incidents of a criminal trial. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 167 (1963). Despite this unequivocal principle, California courts have permitted punitive damages without observing any of the safeguards normally associated with penal-type proceedings under the guise that such punishment is purely "civil" in nature. *Peterson v. Superior Court,* 31 Cal.3d 147, 161, 181 Cal.Rptr. 642 P.2d 1305 (1982). Metromedia believes, however, that the manner in which punitive damages were assessed in the case at bar violated its right to Due [27] Process.

In *Trop v. Dulles,* 356 U.S. 86 (1958), Chief Justice Warren enunciated a formula for determining whether a given statutory scheme such as California Civil Code Section 3294 is penal or civil. As the Chief Justice stated:

> In deciding whether or not a law is penal, this court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that

> is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal.

The California legislature has left no doubt as to the purpose of Civil Code Section 3294. That statute provides in pertinent part:

> In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to actual damages, may recover damages *for the sake of example and by way of punishing the defendant.*

Cal. Civ. Code § 3294(a) (emphasis added).

Indisputably, punitive damages have historically been regarded as punishment. *Smith v. Wade,* 461 U.S. 30, 59 (1983) (Rehnquist, J. dissenting); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). California court decisions have also recognized that the purpose of punitive damages is to punish and deter. See, [28] e.g., *Troensgaard v. Silvecrest Industries, Inc.,* 175 Cal.App.3d 218, 226-227, 220 Cal.Rptr. 712 (1985); *Rosener v. Sears, Roebuck & Co.,* 110 Cal.App.3d 740, 750, 168 Cal.Rptr. 237 (1980). Punitive damage awards can only be viewed as fines just as one would view any other monetary awards imposed by the criminal law. As was observed in *Gertz v. Robert Welch, Inc.,* 418 U.S., 323, 350 (1974):

> [Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.

The fact that the sanction is monetary cannot lessen its penal nature.

Admittedly, California courts have previously rejected the notion that punitive damage awards are penal or quasi-criminal in nature. *Peterson v. Superior Court,* 31 Cal. 3d

147, 161 (1982); *Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 811-812; *Weatherbee v. United Insurance Company of America*, 18 Cal. App.3d 266, 272 (1971); *Toole v. Richardson-Merrill, Inc.*, 251 Cal. App.2d 689 (1967). Nevertheless, Metromedia respectfully submits that these cases are without support in their conclusion, and that punitive damages are in fact penal in nature.

* * * * * * *

APPENDIX G

2nd Civil No.
B022890

In The Court of Appeal
State of California
SECOND APPELLATE DISTRICT
DIVISION SEVEN

APRIL ENTERPRISES, INC.,
Plaintiff/Respondent,

vs.

KTTV and METROMEDIA, INC., and DOES 1 through 50, inclusive,
Defendants/Appellants.

APPEAL FROM
SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE BILLY G. MILLS, JUDGE

APPELLANT'S OPENING BRIEF

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* * * * * *

[49] The injustice of the punitive damages award is underscored by the fact that even April did not anticipate it. Its motion to amend the prayer of its complaint from $10 million to $14 million was not, as contended, an amendment to conform to proof at trial. April's first intimation that it might attempt to amend its prayer upward came only after the jury submitted a question asking the amount of the prayer [Jury Question, CT 1157; Declaration, CT 1574 *et seq.* at ¶ 5, CT 1576]. Thus, all of the evidence had been presented, the jury had been charged and deliberations had proceeded for several days before April, prompted by a jury inquiry as to how badly it could hurt Metromedia, gave an indication that it considered an amendment to "conform" to proof necessary. That necessity, of course, only came to fruition when the jury announced its verdict. If the verdict had been higher, April would undoubtedly have asserted that an amendment to conform to *that* proof was necessary.

Except in cases in which there is a codified measure of damages and the amount of the award is accordingly "embraced within the issue," within the meaning of California Code of Civil Procedure § 580, a plaintiff cannot recover more than the amount of its prayer. *Meisner v. McIntosh* 205 Cal. 11, 269 P. 612 (1928); *Crofoot v. Blair Holdings Corp.*, 119 Cal.App.2d 156, 260 P.2d 156 (1953) (disapproved on other grounds in *Posner v. Grunwald-Marx, Inc.*, 56 Cal.2d 169, 14 Cal. Rptr. 197, 363 P.2d 313 (1961). The trial court's ruling granting April leave to amend, therefore, was erroneous. Moreover, the granting of leave to amend to conform to proof is "manifestly erroneous" when the record shows, as here, that no conformity results due to the absence of the claimed evidence. *Hunt v. Smyth,* 25 Cal.App.3d 807, 830, 101 Cal. Rptr. 4 (1972); *Brautigam v. Brooks,* 227 Cal. App. 2d 547, 561, 38 Cal. Rptr. 784 (1964) That ruling further demonstrates the need for constitutional protection against punitive damages awards, the next and last topic of this Brief.

X

THE JURY AWARD OF $14 MILLION IN PUNITIVE DAMAGES VIOLATED METROMEDIA'S RIGHT DUE TO DUE PROCESS AND TO EQUAL PROTECTION UNDER THE LAWS.

In 1986, the United States Supreme Court stated that the constitutionality of punitive damages "raise[s] important issues which, in an appropriate setting, must be resolved. . . ." *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 106 S. Ct. 1580 (1986). On March 9, 1987, the Supreme Court noted the probable jurisdiction with respect to these issues in *Bankers Life and Casuality v. Crenshaw,* 107 S. Ct. 1367, 94 L. Ed. 2d 683 (1987), thus indicating a continuing interest.

The United States Supreme Court has held that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham v. Wright,* 430 U.S. 651, 669 n.37, 97 S.Ct. 1401 (1977). Punishment administered in noncriminal proceedings has previously been found to warrant application of the eighth amendment. *Trop v. Dulles,* 356 U.S. 86, 78 S. Ct. 590, (1958); *In Re Gault,* 387 U.S. 1, 87 S. Ct. 1428, (1967). Indisputably, the purpose of the $14 million punitive damage award against Metromedia unequivocally follows the classic purposes of criminal punishment. Metromedia objected at trial on the constitutional bases asserted here [CT 1882-1887, 1571-1572]. California Civil Code Section 3294 specifically indicates that the purpose of punitive damages is to punish the defendant and make an example of that party to deter [50] similar conduct. The penal nature of these damages necessitates application of the constitutional safeguard against excessive fines in civil proceedings such as the case at bar.

The punitive damage award also constitutes invidious discrimination against Metromedia which was subjected to an open-ended punitive damage award, while the federal and state legislatures have frequently limited the amount of monetary punishment which can be imposed in both civil and criminal proceedings. The exposure to open-ended damages, not even confined by April's prayer, therefore, violated Metromedia's right to equal protection under the fourteenth amendment, as well as California Constitution Article I, § 7. The California Penal Code is ripe with examples of criminal offenses punishable by a dollar amount no greater than $10,000. *See, e.g.,* Penal Code Sections 490, 449(c), 672, 617 and 622.

Punitive damages, by definition, transfer from one litigant to another a monetary recovery "in excess of . . . actual loss." *Scott v. Donald,* 165 U.S. 58, 86, 17 S.Ct. 265 (1897). Under the Due Process Clause, property rights may be affected, or a person punished, only after due process has been observed. *Ingraham v. Wright,* 430 U.S. at 672. The windfall bounty to April, however, was imposed as a penal fine, confiscating Metromedia's property without affording it the traditional rights required in a criminal or quasi-criminal proceeding. *Smith v. Wade,* 461 U.S. 30, 59, 103 S.Ct. 1625 (1983) (Rehnquist, J. dissenting).

Due process requires that states impose no punishment on an individual without first observing all of the incidents of a criminal trial. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 167, 83 S. Ct. 554 (1963). Nonetheless, California courts have permitted punitive damages without observing any of the safeguards normally associated with penal-type proceedings under the theory that such punishment is purely "civil" in nature, *Peterson v. Superior Court,* 31 Cal. 3d 147, 161, 181 Cal. Rptr. 784 (1982), and this District has recently rejected contentions similar to those set forth above, *Downey Savings and Loan Assn. v. Ohio Casualty Ins. Co.* 189 Cal.App. 3d 1072 234 Cal. Rptr. 835

(1987). In this case, however, where the facts and law failed to support any punitive damages at all, and in the face of a $14 million punitive damages verdict, $4 million in excess of April's prayer, the result should be to the contrary.

CONCLUSION

For the foregoing reasons Metromedia respectfully prays that its appeal from the denial of its motion for judgment notwithstanding the verdict and the granting of April's motion to amend its prayer be granted and that the judgment and those orders be reversed.

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APPENDIX H

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Filed Aug 22 1986

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

CASE NO. C 173 233

APRIL ENTERPRISES, INC., a corporation,
Plaintiff,

vs.

KTTV and METROMEDIA, INC., and DOES 1 through 50,

Defendants.

OPPOSITION TO MOTION FOR LEAVE TO AMEND TO CONFORM TO PROOF AT TRIAL AND FOR PRECAUTIONARY MOTION FOR RELIEF UNDER C.C.P. § 473

Date of
Hearing: August 28, 1986
Time: 9:00 a.m.
Dept.: 35

* * * * * *

III

AN AFTER THE FACT AMENDMENT OF APRIL'S PRAYER FOR PUNITIVE DAMAGES WOULD FURTHER ABRIDGE METROMEDIA'S CONSTITUTIONAL RIGHTS

[13] As will be addressed in greater detail in Metromedia's reply to April's opposition to the motions for judgment notwithstanding the verdict and new trial, to be heard contemporaneously with this motion, the imposition of punitive damages by the jury has violated Metromedia's constitutional rights. This abridgment and violation of Metromedia's constitutional rights is accentuated by April's motion to amend its Complaint in order to ground a judgment which exceeds the amount it prayed for.

The staggering punitive damage award assessed against Metromedia constitutes an excessive fine under the Eighth Amendment of the United States Constitution and under Article I, Section 17 of the California Constitution and is violative of Metromedia's due process rights under the Fifth Amendment of the United States Constitution and under Article I, Section 7 of the California Constitution. These exhorbitant damages amount to a penal fine imposed against Metromedia without the traditional safeguards afforded in a penal-type proceeding and April's attempt to amend over the amount of its prayer only serves to underscore the need for such safeguards. Subjecting Metromedia to open-ended damages also constitutes an invidious discrimination to Metromedia's right to equal protection under the law inasmuch as the California legislature has limited the damages or penalties available in numerous situations, including civil wrongs and criminal offenses. [14] April's attempts to amend its prayers after a jury verdict has been rendered transgress each and all of these constitutional rights.

* * * *

Accordingly, it is respectfully submitted that April's re-

quest to amend be denied and that the $4 million amount, in excess of the original prayer of April's Fourth Amended Complaint, be stricken.

DATED: August 22, 1986.

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APPENDIX I

2nd Civil No.
B022890

In The Court of Appeal
State of California
SECOND APPELLATE DISTRICT
DIVISION SEVEN

APRIL ENTERPRISES, INC.,
Plaintiff/Respondent,

vs.

KTTV and METROMEDIA, INC.,
and DOES 1 through 50, inclusive,
Defendants/Appellants.

APPEAL FROM
SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE BILLY G. MILLS, JUDGE

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* * * * * *

[39]

D. Constitutionality.

" 'It is a general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived.' " (*Hershey v. Reclamation District No. 180* (1927) 200 Cal. 550, 564.)

Here, no constitutional argument was raised by Appellant prior to judgment. In any event, the California Supreme Court (as well as every lower California appellate court) has consistently rejected precisely the arguments resurrected by Appellant. *See Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 402. The unbroken string of authorities rejecting Metromedia's argument continues with *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1100-1101, in which Division Three of this court recently rejected such arguments.

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APPENDIX J

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

2nd CIVIL NO. B022890

APRIL ENTERPRISES, INC.,
Plaintiff/Respondent

vs.

KTTV and METROMEDIA, INC.,
and DOES 1 through 50, inclusive,
Defendants/Appellants

(Los Angeles County Superior Court No. C 173233; The Honorable Billy G. Mills, Presiding)

APPELLANTS' PETITION FOR REHEARING

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* * * * * *

I

APPELLANTS' SUBSTANTIVE DUE PROCESS AND EXCESSIVE FINES CLAUSE CONSTITUTIONAL CHALLENGES TO THE PUNITIVE DAMAGE AWARD ARE NOT PRECLUDED BY CALIFORNIA PRECEDENT

[4] *April II* summarily rejects appellants' constitutional objections to the $14,000,000 punitive damage award as having already been resolved by the California courts. However, that conclusion may only be said to apply to the argument that appellants were improperly denied the constitutional procedural due process safeguards normally associated with judicial proceedings in which punishment is administered. In their briefs, appellants had acknowledged that a similar procedural due process challenge had previously been rejected by the Supreme Court of California and by the more recent opinion of another division of this Court in *Downey Savings and Loan Association v. The Ohio Casualty Insurance Company,* 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied,* 56 U.S.L.W. 3818 (U.S. May 31, 1988).

April II did not even attempt to explain its rejection of appellants' other constitutional challenges to the punitive [5] damage award.[4] Appellants explicitly argued in this

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[4] Nor did *April II* adequately address appellants' challenges to the $3.8 million compensatory damage award. That award was not justified by the evidence and was the result of confusion, passion and prejudice. As argued by appellants both in the trial court and on appeal, it was uncontroverted that the only syndication efforts undertaken by the parties were of little success. Therefore, it is pure conjecture and sheer speculation to assume that in a modern and highly sophisticated market the antiquated Winchell-Mahony Time programs would have a value of anything remotely approaching $3.8 million. "Loss of profits which exist 'only in the fond dreams of the adventurer' will not support a verdict for damages." *Engle v. City of Oroville,* 238 Cal. App. 2d 266, 272, 47 Cal. Rptr. 630 (1965) (quoting *Lacy Mfg. Co. v. Gold Crown Mining*

Court and in the trial court that their "exposure to open-ended damages" (Appellants' Opening Brief, at 50) violated their substantive due process rights under the Federal and California Constitutions (U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7(a)) to adequate advance notice of the range of punishment which could be imposed for their conduct. In addition, appellants' argued that the punitive nature of these damages required the application to this award of the prohibition of the Eighth Amendment of the Federal Constitution and Article I, Section 17 of the California Constitution on the imposition of "excessive fines." *Id.*, at 49-50.

Although the Supreme Court of California has never addressed the Excessive Fines question, this Court may have perceived itself constrained in some manner by the decision in *Downey Savings*, in which the argument that the Excessive Fines [6] Clause is applicable to punitive damage awards imposed in civil proceedings was expressly rejected. If so, it is respectfully submitted that the Court should explain that its rejection of appellants' legitimate constitutional argument here was predicated solely upon the decision in *Downey Savings*. Especially in light of the size of the punitive fine in this case and its intended function as a deterrent to others, it is reasonable to ask this Court to explain why constitutional defenses such as those embraced within the Excessive Fines Clause may not be available in California.

With respect to the constitutional challenge based upon the open-ended nature of the punitive damages, appellants are unaware of any decision of any California Court of

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Co., 52 Cal. App. 2d 568, 574, 126 P.2d 644 (1942)). It was equally erroneous for the trial court to permit the jury to award damages representing profits lost on ventures other than syndication to commercial television (*e.g.*, videocassettes) and to calculate its damage award based on confusion as to respondent's rights to compensation for broadcast and syndication rights.

Appeal or the Supreme Court of California which has addressed and resolved this issue. As appellants pointed out in their Opening Brief in this Court, this constitutional problem is presented on particularly stark facts by this case because the potential punishment was, ultimately, not even limited by the respondent's prayer for relief. The trial court, for all intents and purposes, permitted the jury, unrestrained even by the prayer, to punish the appellants in any amount their passions decreed, thus allowing the jury to award $4,000,000 more in punitive damages than had originally been requested by respondent. Thus, not only does California not provide legislative notice of the level of sanctions which may be imposed for generally unpopular conduct, but California juries are not even to be constrained by the pleadings of the litigants. In short, this case brings vividly to life Justice [7] Blackmun's admonition that "[b]ecause evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded . . . . [t]he impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

Respondent, by its letter to this Court of June 3, 1988, recognized the relevance of the United States Supreme Court's decision in *Bankers Life and Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418 (U.S. May 16, 1988), to these federal constitutional questions. In addition, and as pointed out by appellants in their June 10, 1988 letter to the Court (which reached the Court after its decision was handed down on June 9, 1988 a copy of which is attached to this petition as Appendix A), the only two Justices of the Supreme Court to express an opinion on this issue in *Bankers Life* took the position that state law which gives juries the discretion to make open-ended awards of punitive damages in tort cases "may violate the Due Process Clause," and that the "grant of wholly standardless discretion [to

juries] to determine the severity of punishment appears inconsistent with due process." 56 U.S.L.W., at 8423 (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment).

In Justice Marshall's opinion for the Court in *Bankers Life,* he expressly urged the "state courts . . . to resolve [these constitutional challenges to punitive damages] by relying on the state constitution or on some other adequate [8] and independent non-federal ground . . . and failing that, . . . to decide [these questions] of federal law in the first instance . . . ." 56 U.S.L.W., at 4421. Although appellants recognize that the Supreme Court of California and, ultimately, the Supreme Court of the United States will eventually have to resolve all of these important constitutional questions, this Court should, on rehearing, not fail to respond to the Supreme Court's urging that a state court handling such a case produce a "reasoned opinion" regarding the basis for its decision on the merits of such challenges. *Id.*

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APPENDIX K

2nd Civil No.
B022890

In The Court of Appeal
State of California
SECOND APPELLATE DISTRICT
DIVISION SEVEN

APRIL ENTERPRISES, INC.,
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APPEAL FROM
SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE BILLY G. MILLS, JUDGE

ANSWER TO PETITION FOR REHEARING

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* * * * * * .

One hundred percent of the issues raised in its petition were thoroughly briefed, argued and considered in the [4] second appeal of this action. Metromedia, indeed, does no "more than reargue [its] case."

* * * * * *

IV

THE CONSTITUTIONAL HORSE, WHICH APPELLANT CONTINUES TO FLOG, IS DEAD.

[13] A. *The Constitutionality of Punitive Damages Is No Longer An Issue Before The United States Supreme Court.*

In 1988, in *Aetna Life Insurance Co. v. Lavoie,* ___U.S. ___, 106 S.Ct. 1580, 89 L.Ed.2d 823, 837, the United States Supreme Court expressed interest in deciding the constitutionality of punitive damages in an "appropriate setting." Most observers believed that such a resolution was going to occur in *Bankers Life & Casualty Co. v. Crenshaw,* 56 USLW 4418 (U.S., May 16, 1988). Nevertheless, after oral argument in *April II* and although the U.S. Supreme Court noted probable jurisdic-[14]tion with respect to the constitutional issues in *Bankers Life,* it refused to resolve the issue. The court expressed a strong desire to have the states resolve the issue.

If there was ever any doubt after *Bankers Life* that the U.S. Supreme Court was no longer interested in resolving the constitutionality of punitive damages, such doubt was laid to rest two weeks later. The Court summarily dismissed all six other pending cases in which it had noted probable jurisdiction with respect to punitive damages, including the California decision in *Downey Savings and Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, cited on page 36 of *April II.* The Court thus left each of the various punitive damage awards, previously approved by the state courts, affirmed.

B. *A Long, Uninterrupted Chain of California Authorities Has Consistently And Unanimously Rejected Constitutional Challenges To Punitive Damages.*

Now that the U.S. Supreme Court has decided to leave the issue of the constitutionality of punitive damages to the states, what have the California courts had to say on the issue? The California courts have been far from silent. As our Supreme Court observed in *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 404, fn. 2:

> "In an appendix to its opening brief, Ford offers a number of theories for holding section 3294 unconstitutional. *It is not necessary to devote extensive discussion to the question;* the courts have frequently and uniformly upheld that provision's validity. (E.g., *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819, 169 Cal.Rptr. 691, 620 P.2d 141; [15] *Bertero v. Nat'l Gen. Corp.* (1974) 13 Cal.3d 43, 66, fn. 13, 118 Cal.Rptr. 184, 529 P.2d 608; *Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 489, 136 Cal.Rptr. 132; *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 19-20, 130 Cal.Rptr. 416; *Wetherbee v. United Ins. Co.* (1971) 18 Cal.App.3d 262, 266, 95 Cal.Rptr. 678; *Fletcher v. Western Nat'l Ins. Co.* (1970) 10 Cal.App.3d 376, 404, 89 Cal.Rptr. 78; *Toole v. Richardson-Merrell Inc.* (1967) 251 Cal. App.2d 689, 716, 717, 60 Cal.Rptr. 398.)" (Emphasis added.)

If *April II* sins by not "devoting extensive discussion to the question," it is a sin of which our Supreme Court is equally guilty. Indeed, the string of citations listed in *Hasson* is far from exhaustive. In addition to *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 161, and *Downey Savings & Loan Assn, supra,* cited in *April II,* and those decisions cited in Hasson, the following California opinions

have raised and rejected the constitutional challenges to punitive damages:

Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757;

Gibson v. Gibson (1971) 15 Cal.App.3d 943;

Maheu v. Hughes Tool Co. (C.A. 1977) 569 F.2d 459;

Bertero v. Nat'l Gen. Corp. (1974) 13 Cal.3d 43, 65.

Appellant concedes that the procedural due process challenges to punitive damages has been rejected by our Supreme Court and that the excessive fines argument was recently rejected in *Downey Savings & Loan Assn., supra.* However, Appellant is critical of *April II's* cursory treatment upon a still further variant of the theme:

> "With respect to the constitutional challenge based upon the open-ended nature of the punitive damages, appellants are unaware of any decision of any California Court of Appeal or the Supreme Court of California [16] which has addressed and resolved this issue." (Petition, p. 6.)

This contention is met with relative ease. Appellant simply has overlooked at least three California cases including a renowned decision of the First District Court of Appeal which is not only cited in *Downey Savings & Loan Assn., supra,* which in turn is cited both in *April II* and in Appellant's own Petition, but is cited in nearly all of the California decisions which have uniformly rejected constitutional challenges to punitive damages. The decision in *Toole v. Richardson-Merrell Inc.* (1967) 51 Cal.App.2d 689, states quite explicitly as follows (on petition for rehearing):

> "Our opinion did not dispose of appellant's contention that Civil Code section 3294, which authorizes punitive damages for '* * * oppression, fraud, or malice * * *' is unconstitutional *because it contains no standard by which to measure the punishment, nor any limitation as to the amount*

to be awarded. We find no merit in this contention. A plaintiff's right to exemplary or punitive damages, when the defendant's conduct justifies the award, is generally accepted, and may exist even in the absence of statute. Some authorities have said that the right to such damages is as old as the right to trial by jury. When allowable, the amount to be awarded lies within the sound discretion of the trier of fact [citation] but must bear a reasonable relationship to actual damages suffered. [Citations.] Our statute does no more than recognize the right to punitive damages where the defendant has been found guilty of wrongful conduct showing fraud, oppression or malice. As to malice, we noted in our opinion that it may be established by a showing that the defendant's wrongful conduct was willful, intentional, and done in reckless disregard of its possible results. It cannot be found in a vacuum. Its existence depends upon facts proven. Where, as here, its existence as a fact is supported by evidence in the record, *we see no offense to the Constitution, and no deprivation of any constitutional right of appellant in committing the assessment of such damages, including the amount to be* [17] *allowed, to the sound discretion of the jury.*" (Emphasis added.)

Similarly, in *Zhadan v. Downtown L.A. Motors (1976) 66 Cal.App.3d 481, 501:*

"Defendant attacks the application of Civil Code section 3294 because of its lack of a 'precise standard by which to fix the quantum of property of which cross-appellant was to be deprived by way of exemplary damages other than solely the admonition that the jury's discretion be exercised without passion or prejudice.' "

Relying upon the Superior Court's decision in *Bertero v. National General Corp., supra,* the Court rejected the "open-endedness challenge."

Respectfully, this Court was fully justified in refusing Metromedia's invitation to reject thirty years of well-established, unquestioned and unanimous California authority and to ignore the unequivocal rulings of our Supreme Court. While it is true that the United States Supreme Court could have stepped in and preempted the area, it chose, in no uncertain terms, not to do so.

CONCLUSION

Metromedia harps upon some "unprecedented" aspect to this action. Nothing could be more inaccurate. The legal principles which governed the resolution of the legal and factual issues are not of recent origin.

* * * * * *

APPENDIX L

CHAPTER 1498
(Senate Bill No. 241)

An act to amend Section 6146 of the Business and Professions Code, to amend Sections 3294 and 3295 of, and to add Section 1714.45 to, and to add Title 13.5 (commencing with Section 2860) to Part 4 of Division 3, of, the Civil Code, and to add Section 425.13 to the Code of Civil Procedure, relating to liability.

[Approved by Governor September 30, 1987. Filed with Secretary of State September 30, 1987.]

LEGISLATIVE COUNSEL'S DIGEST

SB 241, Lockyer. Liability.

(1) Under existing law, an attorney may not contract for or collect a contingency fee in certain actions against a health care provider in excess of 40% of the first $50,000 recovered, 33$^{1}/_{3}$% of the next $50,000 recovered, 25% of the recovery between $100,000 and $200,000, and 10% of the recovery in excess of $200,000.

This bill would change the latter two limits to 25% of the recovery between $100,000 and $600,000, and 15% of the recovery in excess of $600,000.

(2) Under existing law, a manufacturer or seller of a product may be liable for damages caused by a defective product.

This bill would provide that a manufacturer or seller is not liable in a product liability action if the product is inherently unsafe, is known to be unsafe by the ordinary consumer, and the product is a common consumer product intended for personal consumption such as sugar, castor oil, alcohol, tobacco, or butter.

(3) Under existing case law, if, in a liability action against an insured, the insurer reserves its right to assert non-coverage, the insured has a right to independent legal counsel in certain cases where there is a conflict of interest.

This bill would provide that if an insurance policy imposes a duty to defend upon an insurer, and a conflict of interest arises that creates a duty to provide independent counsel, the insurer shall provide counsel unless, after the insured is informed of the conflict the insured waives the right.

The bill would provide that a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage, but that when an insurer reserves its rights on a given issue and the outcome of that issue can be controlled by the counsel retained by the insurer, a conflict exists. It would provide that no conflict exists as to allegations of punitive damages or solely because the insured is sued for amounts in excess of the policy limits.

The bill would authorize the insurer to require independent counsel to possess minimum qualifications, and would limit fees. It would specify that a fee dispute would be resolved by binding arbitration. It would specify that different or additional policy provisions concerning attorney's fees are not invalidated.

It would require independent counsel and the insured to disclose relevant information to the insurer, as specified, and would require cooperation between independent counsel and counsel for the insurer.

It would set forth the form for a waiver of the right to counsel.

(4) Under existing law, in an action for the breach of an obligation not arising from contract, if the defendant has been guilty of oppression, fraud, or malice, the plaintiff

may recover exemplary or punitive damages. Existing law defines "malice" as conduct intended to cause injury or conduct carried on with a conscious disregard of the rights or safety of others, and defines "oppression" as subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

This bill would require proof of oppression, fraud, or malice by clear and convincing evidence. It would define malice as conduct intended to cause injury or despicable conduct carried on with a willful and conscious disregard of the rights or safety of others, and it would define "oppression" as despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(5) Existing law provides that the court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for exemplary or punitive damages prior to the introduction of evidence of the profits the defendant has gained by virtue of the wrongful course of conduct and the financial condition of the defendant.

This bill would provide that the court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for the plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud. It would provide that a claim for exemplary damages shall not state an amount or amounts. It would provide that a claim for punitive damages may not be included in a complaint or other pleading against a health care provider unless allowed by the court, as specified.

The people of the State of California do enact as follows:

SECTION 1. This act shall be known and may be cited as the Willie L. Brown Jr.-Bill Lockyer Civil Liability Reform Act of 1987.

SEC. 2. Section 6146 of the Business and Professions Code is amended to read:

§ 6146. (a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

(2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.

(3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered.

(4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars ($600,000).

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(c) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office overhead costs or charges are not deductible disbursements or costs for such purpose.

(2) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500), or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code, and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(3) "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

SEC. 3. Section 1714.45 is added to the Civil Code, to read:

§ 1714.45. (a) In a product liability action, a manufacturer or seller shall not be liable if:

(1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and

(2) the product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts.

(b) For purposes of this section, the term "product liability action" means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty.

(c) This section is intended to be declarative of and does not alter or amend existing California law, including Cronin v. J.B.E. Olson Corp., (1972) 8 Cal. 3d 121, and shall apply to all product liability actions pending on, or commenced after, January 1, 1988.

SEC. 4. Title 13.5 (commencing with Section 2860) is added to Part 4 of Division 3 of the Civil Code, to read:

TITLE 13.5
OBLIGATION TO DEFEND ACTION

§ 2860. (a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide such counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to such counsel. An insurance contract may contain a provision which sets forth the method of selecting such counsel consistent with this section.

(b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

(c) When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of tort liti-

gation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligation to pay fees to such independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. The provisions of this subdivision shall not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

(d) When independent counsel has been selected by the insured, it shall be the duty of such counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

(e) The insured may waive its right to select independent counsel by signing the following statement:

"I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit."

(f) Where the insured selects independent counsel pursuant to the provisions of this section, both the counsel

provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation. Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract.

SEC. 5. Section 3294 of the Civil Code is amended to read:

§ 3294. (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedant died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Senate Bill No. 241 of the 1987-88 Regular Session apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

SEC. 6. Section 3295 of the Civil Code is amended to read:

§ 3295. (a) The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294, prior to the introduction of evidence of:

(1) The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence.

(2) The financial condition of the defendant.

(b) Nothing in this section shall prohibit the introduction of prima facie evidence to establish a case for damages pursuant to Section 3294.

(c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. However, the plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the profits or financial condition referred to in subdivision (a), and the defendant may be required to identify documents in the defendant's possession which are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts. Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. Such order shall not be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial.

(d) The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be pre-

sented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.

(e) No claim for exemplary damages shall state an amount or amounts.

(f) The amendments to this section made by Senate Bill No. 241 of the 1987-88 Regular Session apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

SEC. 7. Section 425.13 is added to the Code of Civil Procedure, to read:

§ 425.13. No claim for punitive damages against a health care provider shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier.

EXPLANATORY NOTES CH 1498:

B & P C § 6146. Substituted (1) "five hundred thousand dollars ($500,000)" for "one hundred thousand dollars ($100,000)" in subd (a)(3); and (2) "Fifteen percent" for "Ten percent" and "six hundred thousand dollars ($600,000)" for "two hundred thousand dollars ($200,00)" in subd (a)(4).

CC § 3294. (1) Added "it is proven by clear and convincing evidence that" in subd (a); (2) added "despicable" and "willful and" in subd (c)(1); (3) substituted "despicable conduct that subjects" for "subjecting" in subd (c)(2); and (4) added subd (e).

CC § 3295. Added subds (d)-(f).

APPENDIX M

HURLEY, GRASSINI & WRINKLE
A LAW CORPORATION

June 3, 1988

The Honorable Mildred L. Lillie
Presiding Justice, Division Seven
Second Appellate District
California Court of Appeal
3580 Wilshire Boulevard
Los Angeles, CA 90010

Re: April Enterprises, Inc. v. KTTV and Metromedia, Inc. 2nd Civil No. B 022890

Dear Justice Lillie:

As I referred during oral argument to the fact that the *Bankers Life v. Crenshaw* case, regarding the constitutionality of punitive damage awards, was currently pending before the United States Supreme Court, I believe it is appropriate to bring the following two developments to this Court's attention:

1. The U.S. Supreme Court issued its opinion in *Bankers Life* on May 16, 1988. A copy of the opinion, at L.A. Daily Journal, 88 DAR 6103, is enclosed.

2. On Monday, May 30, 1988, the U.S. Supreme Court dismissed six other pending cases involving the issue of the constitutionality of punitive damages, including the California decision in *Downey Savings and Loan Assn. v. Ohio Casualty Insurance Co.* (1987) 189 Cal.App.3d 1072, cited at page 39 of our Respondent's Brief herein. A copy of the Wednesday, June 1, 1988, Los Angeles Times report of these events is enclosed. The Court thus upheld punitive awards ranging from 3.5 to 10 million dollars.

Very truly yours,
/s/ Roland Wrinkle
ROLAND WRINKLE

RW/js
enclosures

cc: Dean Stern, Esq.
Gibson, Dunn & Crutcher
(Counsel for appellant)

APPENDIX N

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BY HAND DELIVERY

The Honorable Mildred L. Lillie
Presiding Justice, Division Seven
Second Appellate District
California Court of Appeal
3580 Wilshire Boulevard
Los Angeles, CA 90010

Re: *April Enterprises, Inc., respondent v. KTTV and Metromedia, Inc., appellants*

Honorable Justice Lillie:

This responds to Mr. Wrinkle's letter to the Court dated June 3, 1988, with respect to the decision of the United States Supreme Court in *Bankers Life and Casualty Co. v. Crenshaw,* No. 85-1765 (May 16, 1988). Quite contrary to the suggestion implicit in that letter, the *Bankers Life* decision does not validate punitive damages. In fact, the action and words of the Supreme Court reinforce the need for and jurisprudential importance of this Court addressing the constitutional challenges advanced by appellants to the $14,000,000 punitive damage award in this case.

On April 22, 1986, the United States Supreme Court stated that constitutional challenges to punitive damages

under the Due Process Clause, Contracts Clause and Excessive Fines Clause "raise important issues which, in an appropriate setting, must be resolved. . . ." *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 828-29. In *Bankers Life,* the Supreme Court was again faced with these constitutional objections to punitive damages. The Court declined to address them on the merits because those issues had not been properly presented in the state court proceedings.

Nonetheless, the Supreme Court observed that the constitutional questions presented issues of " 'great public importance.' " Slip Op. at 7. The Court stressed that before it reached these issues, it would benefit from a "well-developed record and a reasoned opinion on the merits" by the state courts regarding these federal constitutional questions. Slip Op. at 8. In a concurring opinion, Justice O'Connor, joined by Justice Scalia, noted that the "punitive character," of such awards and the "standardless discretion [vested in juries] to determine the severity of punishment appears inconsistent with due process." Slip Op. at 2-3.

Thus, assuming that a tort predicate for punitive damages can be found to exist, an assumption which we obviously dispute, the *Bankers Life* decision by the Supreme Court does not in any fashion reject the merits of appellants' constitutional challenges but instead strongly supports the value and appropriateness of a full and well-reasoned exploration of these issues by *this* Court in the instant case.

Yours very truly,
/s/ Dean Stern
Dean Stern

DS:mcf
CC Robert Wrinkle, Esq.
9095w

APPENDIX O

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VIA HAND DELIVERY

The Honorable Mildred L. Lillie
Presiding Justice, Division Seven
Second Appellate District
California Court of Appeal
3580 Wilshire Boulevard
Los Angeles, California 90010

Re: *April Enterprises, Inc. v. KTTV and Metromedia, Inc.*, 2nd Civil No. B022890

Dear Justice Lillie:

Pursuant to Rule 978, California Rules of Court, appellants KTTV and Metromedia, Inc. hereby request that the Court certify for publication the Opinion of the Court dated June 9, 1988 in the above-referenced case ("*April II*"). This request is based upon the standards for publication contained in Rule 976 of the California Rules of Court. Specifically, *April II* meets the standards for publication in each of the following respects:

(1) *April II* affirms a $14,000,000 jury-imposed punitive damage judgment. Although authoritative statistics re-

garding such matters do not appear to be available, as far as appellants are aware, this is the largest punitive damage award ever affirmed by an appellate court in California. In fact, the largest previous such award known to appellants was $5,000,000, slightly more than one-third the award in this case. (*See Downey Savings and Loan Association v. The Ohio Casualty Insurance Company*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 56 U.S.L.W. 3818 (U.S. May 31, 1988)). Thus, *April II* increases by 200% and $9,000,000 the quantitative level of punitive fines which have been approved for imposition by California juries for conduct which they may find offensive and worthy of punishment. By any standard, therefore *April II* involves a legal development of significant continuing public interest. Rule 976(b)(3). Furthermore, the amount of the *April II* punitive damage award, standing alone, establishes a new quantitative standard of law against which future punitive damages may be measured. As a new legal standard, publication is warranted under Rule 976(b)(1). Finally, because this award represents a major, unprecedented increase in the permissible range of punitive damages in California, it presumptively involves application of an existing rule (or standard) to a set of facts which this Court perceived as significantly different and/or more egregious than any previous California case. Rule 976(b)(1).

(2) *April II* rejects California and United States constitutional challenges to California's punitive damage law and its application in this case. Those constitutional defenses have been characterized as "important" and "far-reaching" by the United States Supreme Court. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-829, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986); *Banker's Life and Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418, 4420 (May 16, 1988). *April II* thus establishes new rules of law in California on matters of significant and widespread public interest and should be published under Rule 976(b)(1), (3).

(3) *April II* also establishes a new rule of law or applies existing rules of law to a set of facts significantly different from those stated in published California opinions in that it authorizes a party to amend its prayer for damages after a case has been submitted to the jury, in response to the jury's expression of interest in awarding larger punitive damages than prayed for. Appellants are aware of no other case permitting amendments to pleadings under circumstances remotely similar to these. Rule 976(b)(1).

(4) *April II* adopts a view of the law of the case doctrine which is in conflict with that of most modern published California opinions. Rule 976(b)(2). In *April II*, the Court declared itself bound by the *dictum* expressed in *April I* regarding problems the Court anticipated "may be raised" by "likely configurations" of the facts as they may emerge at trial. 147 Cal. App. 3d 805, 833. As a result, *April II* refused to address important questions of contract interpretation in the light of the evidence which was produced at trial. This construction of the law of the case doctrine renders an appellate court's legal analysis of permissible inferences to be drawn from the pleadings into a final judgment on the merits.

(5) *April II* also creates an apparent conflict in the law of California in that it holds that a court may imply into a contract a covenant which conflicts with and overrides an express provision of that same contract. This proposition is contrary to several published opinions, including: *Malmstrom v. Kaiser Alum. & Chem. Corp.*, 187 Cal. App. 3d 299, 231 Cal. Rptr. 820 (1986); *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605, 119 Cal. Rptr. 646 (1975); and *Stevens v. National Broadcasting Co.*, 270 Cal. App. 2d 886, 76 Cal. Rptr. 106 (1969). Rule 976(b)(2).

(6) *April II* establishes new rules of law, modifies existing rules of law, and creates apparent conflicts in the

law in holding that a joint venture relationship may be inferred notwithstanding a comprehensive written contract between the parties which explicitly establishes an independent contractor relationship and includes an integration clause which negates any prior or superseding agreements or understandings between the parties. Rule 976(b)(1), (2).

(7) *April II*, in general, represents a significant development in California contract law, especially in its imposition of massive, unprecedented punitive damages for violation of a retroactive implied covenant which conflicts with a right explicitly granted by a contract. If the laws of California are to be interpreted to permit this manner of serious *post hoc* restructuring of the relationship between contracting parties, the Court should make this development and the legal reasoning underlying it available through a published opinion to the citizens and bar of the State of California. Rule 976(3).

Very truly yours,

/s/ Jody E. Porter
Jody E. Porter

JEP/jb/0926v

cc: Roland Wrinkle, Esq.
Counsel for Respondent
April Enterprises, Inc.
(Hand delivered)

HURLEY, GRASSINI & WRINKLE
A LAW CORPORATION

June 28, 1988

The Honorable Mildred L. Lillie
Presiding Justice, Division Seven
Second Appellate District
California Court of Appeal
3580 Wilshire Boulevard
Los Angeles, CA 90010

Re: April Enterprises, Inc. v. KTTV and Metromedia, Inc.
2nd Civil No. B 022890

Dear Justice Lillie:

By letter of June 24, 1988, counsel for Metromedia has asked this Court to reverse its decision not to publish its Opinion, filed June 9, 1988, in the second appeal following the second trial of this case. We respectfully, but vigorously, oppose such a request. A brief review of the procedural structure of this twelve-year-old action makes clear that the Court's determination not to publish *April II* was well within its discretion.

April I, (1983) 147 Cal.App.3d 805, was indeed prototypical of a published opinion. Evolving issues of law, of great significance to the legal community, were discussed, refined and applied. With the trier of fact not having had an opportunity to resolve any factual issues, this Court in *April I* was faced exclusively with issues of law. Not only did the Court undertake to review and resolve a myriad of legal issues which controlled the case, but it specifically expressed its intent to do so:

> "Accordingly, this judgment could have been reversed without reaching a number of the issues decided in this Opinion. However, we desire to

> avoid a game of judicial ping pong between trial and appellate Court, if at all possible. Thus we felt it important to dispose of some particularly knotty legal problems which we anticipate may be raised by likely configurations of the facts as might emerge early in the proceedings." (*April I*, 147 Cal.App.3d at 834.)

Faced with a series of adverse rulings in *April I*, Metromedia petitioned this Court for rehearing. On November 2, 1983, the Court modified the Opinion while denying the petition for rehearing. Seeking further review of the published Opinion in *April I*, Metromedia filed a petition for hearing before the California Supreme Court. The Supreme Court refused to hear the case, thus leaving *April I* as published law in California with respect to the issues discussed therein. This Court's Opinion then became final.

Upon remand, the case was tried to a jury under the express auspices of the legal rulings embodied in *April I*. The jury's resolution of the disputed factual issues was subsequently approved by the trial Court.

The vast majority of Metromedia's oversized Opening Brief in *April II* was devoted to rehashing the legal principles which had been established in the published Opinion in *April I*. It attempted, five years later, to convince the Court to reverse those rulings notwithstanding modification upon denial of its petition for rehearing and denial by our high court of petition for hearing.

Now, in its letter requesting publication, Metromedia is essentially asking this Court to publish *April II* simply because *April II* necessarily, although in an abbreviated fashion, made reference to the legal issues resolved in *April I*. This, of course, makes no sense. It is *April I*, in which those issues were resolved, which deserves publication—not *April II*.

Thus, Metromedia seeks publication because *April II* purportedly held that the express contractual provision re-

garding erasure of the tapes was subject to the implied covenant of good faith and fair dealing. However, *April II* did not establish that principle—*April I* did!

Metromedia contends the guidelines contained in Rule 978 were met in that *April II* supposedly established a joint venture may exist notwithstanding a written contract nominally designating one party as an independent contractor. However, *April II* did not establish that—*April I* did!

Metromedia argues that this Court erred in deciding not to publish *April II* because *April II* held that the written contract was consistent with a joint venture relationship. However, *April II* did not resolve that—*April I* did!

In its concluding sentence, Metromedia summarizes its position as follows:

> "If the laws of California are to be interpreted to permit this manner of serious *post hoc* restructuring of the relationship between contracting parties, the Court should make this development and the legal reasoning underlying it available through a published Opinion to the citizens and bar of the State of California. Rule 978(3)."

Metromedia's distortive, disparaging and self-serving characterization of the holdings of *April II* aside, Appellant's concern that the bench and bar become aware of this Court's application of the implied covenant and principles of joint venture to the facts of this case, is much more easily satisfied. All the bench and bar need do is read *April I*—which has been published law in California for the past five years.

Section I of the Opinion in *April I* discusses, in plenary fashion, the application of the implied covenant of good faith to the erasure clause of the 1965 contract. This discussion was published as a part of *April I* and is merely referred to, without significant additional discussion, in

April II. The "legal reasoning underlying it," which Metromedia seeks to bring to the attention of the bench and bar, is found in *April I*. Similarly, Section II of the Opinion in *April I* discusses, at considerable length, the application of joint venture principles to the facts of the case. Again, the "legal reasoning underlying it" is set forth in *April I*—not in *April II*.

This Court's discussion of the punitive damage issues raised by Metromedia in *April II* is not as momentous and weighty as Appellant portrays it to be. Initially, it should be noted that the issue of imposing punitive damages for the malicious, fraudulent or oppressive conduct of a *fiduciary* is not a novel proposition, first espoused in *April II*. The unquestioned nature of this principle is confirmed by Appellant's decision to never even raise it at any point during the twelve years of this litigation. Moreover, *April II* contains no such discussion, whether raised by Appellant or not. Thus, Rule 978 is far from satisfied. *April I*, however, did discuss the potential for a trier of fact to find Metromedia guilty of "an aggravated breach of the covenant of fair dealing" (*April I*, 147 Cal.App.3d at 818) and its conduct to be "presumptively fraudulent" as a fiduciary (*April I*, 147 Cal.App.3d at 828, fn. 11).

The Court's discussion of punitive damages in *April II* simply does not qualify for publication under Rule 978. Section IV of the Opinion addressed each of the four points raised by Metromedia: (1) Whether the trial Court's decision to allow Winchell to perform briefly was prejudicial error, is an issue unique to this case and of little significance to the bench and bar. (2) This Court's rejection of Appellant's argument that punitive damages were inappropriate because certain Metromedia employees are no longer there does not merit publication. There was uncontroverted evidence that Metromedia "management" made the decision, with the approval of its president. (3) Section IV(c) deals with the amendment to conform to proof. Appellant relied on decisions in which the plaintiff,

unlike April, failed to make a motion to amend. This Court's recognition that the trial Court's granting of such a motion is a matter of discretion, liberally applied, is hardly a "new rule of law." (4) With respect to the constitutional issues, how can Metromedia, with a straight face, argue that *April II*, by rejecting the constitutional challenges, "thus establishes new rules of law in California" when all *April II* did was, in one brief paragraph, state that these issues had been resolved by the California Supreme Court in *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 161 (*April II*, page 36). Moreover, the United States Supreme Court has firmly stated that the issue should be left to the states for resolution. Thus, the Court in *Bankers Life and Casualty Co. v. Crenshaw*, 56 USLW 4418 (May 16, 1988), refused to reach the issue and then, on the following Monday, dismissed all six cases presenting the issue, including *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, cited in *April II*. By leaving it to the states for resolution, the California Supreme Court decision in *Peterson*, *supra*, constitutes such a resolution.

Finally, Metromedia's contention that "this award represents a major, unprecedented increase in the permissible range of punitive damages in California" is simply outlandish. With no authority, facts or support whatsoever, Metromedia's conclusion that the award is "unprecedented" is based *exclusively* upon the following statement by Metromedia: ". . . as far as appellants are aware . . ." (page one of Metromedia's June 24, 1988, letter). Moreover, Metromedia's argument erroneously assumes that there is any rule of law which places a finite range on punitive damage awards, irrespective of the reprehensibility of the defendant's conduct, the amount of compensatory damages, and the wealth of the defendant. This award, far from being "unprecedented," constituted one-half of one percent of Appellant's assets or one week's net income, was a 3-1/2 to 1 ratio to compensatory damages, and was

based upon the testimony of Metromedia's own vice president that, at a time when it had no right to syndicate and was trying to wrest these rights from April, Metromedia gave April an "ultimatum" to sign the deal or have the tapes erased "so that he'd never be able to go forward with his syndication," and then destroyed the tapes "to show him." Judged by the time-honored and well-established tripartite test of wealth, reprehensibility, and ratio to compensatory damages—instead of Metromedia's "as far as Metromedia is aware" test, this award is anything but unprecedented.

Respondent believes that it has adequately answered each of Appellant's challenges to the correctness of this Court's decision not to publish *April II*. The only point which Respondent has been unable to resolve is Appellant's desire to affirmatively seek publication of an Opinion in which Metromedia was found quilty of malice, fraud and oppression.

Very truly yours,

/s/ Roland Wrinkle
ROLAND WRINKLE

RW/js

cc: Jody E. Porter, Esq.
Gibson, Dunn & Crutcher